Supreme Court, U.S.
FILED

05-353 SEP 15 2005

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No. 05-___

IN THE

Supreme Court of the United States

Peabody Western Coal Company and
Peabody Coal Company, LLC,
Petitioners,

v.

Equal Employment Opportunity Commission.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 15, 2005

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QUESTION PRESENTED

Whether a plaintiff may join as an involuntary defendant under Federal Rule of Civil Procedure 19 a party which the plaintiff is prohibited from suing directly.

RULE 29.6 STATEMENT

Petitioner Peabody Western Coal Company is a wholly owned subsidiary of Peabody Holding Company, Inc. Petitioner Peabody Coal Company, LLC, is wholly owned by Interior Holdings, LLC, which is wholly owned by Eastern Coal Company, LLC, which is wholly owned by Peabody Holding Company, Inc. Peabody Holding Company, Inc., in turn, is wholly owned by Peabody Investments Corp., which is wholly owned by Peabody Energy Corporation, a publicly held company.

PARTIES TO THE PROCEEDING BELOW

Petitioner Peabody Western Coal Company appeared in the court below but in some instances was erroneously designated as Peabody Coal Company. For avoidance of doubt, both companies are named as petitioners in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Peabody Western Coal Company and Peabody Coal Company, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-18a) is published at 400 F.3d 774. The opinion of the district court (*id.* 19a-48a) is published at 214 F.R.D. 549.

JURISDICTION

The court of appeals denied rehearing and rehearing en banc on May 18, 2005. See Pet. App. 49a. On August 3, Justice O'Connor extended the time to file this petition to and including September 15, 2005. App. 05A122. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULE

Title VII of the Civil Rights Act of 1964, provides, in relevant part:

> It shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1).

42 U.S.C. 2000e(b) provides, in relevant part, that for purposes of Title VII, "[t]he term 'employer' * * * does not include (1) * * * an Indian tribe."

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[1] Because the real party in interest is petitioner Peabody Western Coal Company, hereinafter we use the singular "petitioner."

42 U.S.C. 2000e-2(i) provides:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. 2000e-5(f)(1) provides, in relevant part:

> In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

Federal Rule of Civil Procedure 19 provides, in relevant part:

> (a) Persons to be Joined if Feasible. A person * * * whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if * * * the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the

parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

STATEMENT OF THE CASE

By statute, Congress has provided that suits by the federal government against Indian tribes under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, must be filed by the Department of Justice rather than the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. 2000e-5(f)(1), 2000e-6. The Ninth Circuit in this case, however, permitted the EEOC to circumvent this statutory restriction merely by suing a third party and then "joining" a tribe as a defendant. The court of appeals recognized that its ruling conflicts with the holding of two other circuits that Rule 19 does not provide parties with an avenue for evading limitations on their right to bring a direct suit against a defendant.

1. Title VII prohibits, *inter alia*, discrimination on the basis of national origin in certain employment relationships. 42 U.S.C. 2000e-2(a) to -2(d). Respondent EEOC construes that prohibition to include discrimination in favor of members of an Indian tribe. See *Dawavendewa* v. *Salt River Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1121 (CA9 1998). Congress, however, made a special exception for certain employment preferences for Indians living on or near a reservation:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. 2000e-2(i). The EEOC interprets this exception narrowly to permit preferences for Indians generally, but not preferences for members of the particular Indian tribe on or

near whose reservation the business operates. *Dawavendewa*, 154 F.3d at 1121.

On the EEOC's reading of Title VII, the statute renders invalid provisions in mining leases promulgated and subsequently re-approved by the Department of the Interior. The leases, which are entered into between tribes and mining companies, call for the mining companies to employ a hiring preference for members of the tribe in question. See Pet. App. 2a-4a; *id.* 30a. The EEOC's position also invalidates statutes enacted by numerous Indian tribes including the Navajo Nation (Nation), which is the country's largest federally recognized tribe.[2] To "protect the health, safety, and welfare of Navajo workers," 15 Navajo Nation Code 602(a)(6), quoted in *Ariz. Pub. Serv. Co.* v. *Aspaas*, 77 F.3d 1128, 131 (CA9 1995), the Nation has adopted the Navajo Preference in Employment Act (NPEA), which requires "[a]ll employers doing business within the territorial jurisdiction of the Navajo Nation, or engaged in any contract with the Navajo Nation" to "[g]ive preference in employment to Navajos," 15 Navajo Nation Code 604, quoted in Pet. App. 30a.

The EEOC cannot, however, sue Indian tribes under Title VII. Although Congress generally empowered the EEOC to enforce Title VII through suits in federal court, see *id.* § 2000e-5(f)(1), it specifically exempted from that authority claims against any "government, governmental agency, or political subdivision," *ibid.* See also 42 U.S.C. 2000e-5(f)(2), 2000e-8(c). Such suits must be brought not by the EEOC but instead by the Department of Justice. *Ibid.* The EEOC acknowledges that this provision vests the authority to sue Indian tribes in the Department of Justice. See Pet. App. 35a. In addition, neither the EEOC nor the Department of Justice may sue a tribe in its capacity as an employer because

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[2] The Nation has over a quarter-million enrolled members and reservation lands covering 27,000 square miles in Arizona, Utah, and New Mexico.

Congress exempted Indian tribes from the definition of covered "employers" under Title VII. 42 U.S.C. 2000e(b).

2. Petitioner Peabody Western Coal Company (PWCC) mines coal within the Nation's territorial jurisdiction. In hiring employees for those mining operations, it is, for two reasons, required to give preference to members of the Nation. First, the preference is embodied in the leases – prepared and approved by the Department of the Interior – between petitioner and the Nation that govern petitioner's mining operations. See Pet. App. 30a, 2a. The leases were amended and re-approved in 1987 and 1999, with no changes to the preference provisions. *Id.* 29a. Either the Nation or the Department of Interior may cancel the leases for a violation of their terms. *Id.* 3a. Second, petitioner is subject to the NPEA with respect to its mining operations within the territory of the Nation.

In 2001, respondent EEOC initiated this action by suing PWCC's parent company, petitioner Peabody Coal Company, under Title VII. The complaint rests on the EEOC's view that an employment preference in favor of members of one particular tribe constitutes prohibited national-origin discrimination and that the exception created by 42 U.S.C. 2000e-2(i) does not permit a business to provide employment preferences to members of the tribe on whose reservation it operates. The EEOC specifically alleged that petitioner, in compliance with the terms of the leases, "has a history of refusing to hire non-Navajo Native Americans for open positions at its mine," in violation of Title VII. Compl. 3.

The EEOC sought an order requiring petitioner to pay back pay and compensatory and punitive damages to a "class" of non-Navajo Native Americans. Compl. 4. The EEOC also sought "a permanent injunction" against "Peabody, its officers, successors, assigns, and all persons in active concert or participation with it." *Ibid.* EEOC has never suggested that the suit was authorized by the Department of Justice, which did not sign the complaint. See *id.* at 5.

Petitioner sought to dismiss the EEOC's complaint, explaining that it was nothing more than a thinly veiled suit against the Nation that the EEOC was prohibited from bringing directly. In response, the EEOC moved to join the Nation as a defendant under Federal Rule of Civil Procedure 19. The EEOC specifically requested that the district court "order the Navajo Nation to appear and defend any interests it believes may be affected by this litigation." Pet. App. 34a. As the district court recognized, those interests are substantial, for the EEOC "characterizes [its] lawsuit as litigation over 'the validity of its [the Navajo Nation's] discriminatory lease provision and employment preference provisions * * * [and] the interplay between its tribal sovereignty and Title VII.'" *Ibid.* (quoting EEOC's Opposition to Dismissal 4).

The district court held that the EEOC could not employ the joinder provisions of the Federal Rules of Civil Procedure to avoid the statutory prohibition that precluded it from suing the Nation directly. Not only are tribes "specifically exempt as employers from the requirements of Title VII," Pet. App. 37a (citing 42 U.S.C. 2000e(b)), but "[t]he Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved," *ibid.* (citing 42 U.S.C. 2000e-5(f)(1), (2); *id.* § 2000e-8(c)). The district court found persuasive decisions of other federal courts rejecting similar attempts by the EEOC to invoke "joinder" to circumvent the prohibition on suits against a governmental entity imposed on it by statute. *Id.* 36a-37a (citing cases). The district court explained:

> The EEOC in effect is seeking to sue the Navajo Nation to force it to defend the Navajo Preference in Employment Act and its contracts with employers working on its lands, when it is prohibited from suing the Navajo Nation to enforce Title VII provisions against the tribe directly. This is contrary to the clear provisions of Title VII prohibiting the

> EEOC from suing governments, and specifically exempting the Indian tribes from its provisions.

Id. 37a-38a. Indeed, under these provisions, "joinder of an Indian tribe under Rule 19 would divest the EEOC of its authority to litigate." *Id.* 39a.

The district court further concluded that the Nation was an indispensable party to the suit, such that the EEOC's complaint must be dismissed because the Nation could not be joined. In particular, the absence of the Nation as a party would prejudice its own sovereign interests and the interests of the tribal members it represents. Pet. App. 40a. The court accordingly denied the EEOC's motion to join the Nation and dismissed the complaint. *Id.* 41a.

3. On the EEOC's appeal, the Ninth Circuit reversed. The court of appeals characterized the suit as, fundamentally, a challenge to the provisions of the leases between petitioner and the Nation that had been issued and approved by the Department of Interior to "require[e] that preference in employment be given to members of the Navajo Nation." Pet. App. 2a. The court of appeals did not doubt the district court's conclusion that, with respect to such a claim, "the EEOC cannot directly sue the Nation." *Id.* 5a. Rather, it held that so long as the EEOC does not seek affirmative relief from the Nation, "joinder * * * is not prevented by the fact that the EEOC cannot state a cause of action against [the Nation]." *Id.* 6a.

The Ninth Circuit reasoned in two stages. First, it agreed with the district court and the parties "that the Navajo Nation is a necessary party under Rule 19(a)(1)." Pet. App. 9a. It recognized that "the Nation is a signatory to lease provisions that the [EEOC] challenges under Title VII." *Ibid.* The court of appeals accordingly deemed the Nation an indispensable party under the settled rule that "tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise." *Ibid.*

Second, the Ninth Circuit nonetheless rejected the district court's conclusion that the Nation could not feasibly be joined to the suit under Rule 19. The court of appeals did not doubt that, through the provisions exempting tribes from the definition of "employer" and providing that only the Department of Justice could sue a government, Congress had prohibited the EEOC from suing the Nation under Title VII. Pet. App. 10a-11a. But it held that the case was controlled by the circuit's prior construction of the Rules of Civil Procedure as providing that "a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id.* 11a (citing *National Wildlife Fed'n* v. *Espy*, 45 F.3d 1337, 1344-45 (1995); *Beverly Hills Sav. & Loan Ass'n* v. *Webb*, 406 F.2d 1275, 1279-80 (1969)).

The court of appeals explained that its ruling was consistent with decisions of the First, Sixth, and Tenth Circuits. Pet. App. 11a (citing *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1077 (CA10 1988)); *id.* 14a (citing *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 52 (CA1 2002); *EEOC* v. *MacMillan Bloedel*, 503 F.2d 1086, 1088 (CA6 1974)). But it acknowledged the contrary holding of the D.C. and Fifth Circuits – with which the Ninth Circuit "has never agreed" (*id.* 12a) – that "it is implicit in Rule 19(a) itself that before a party * * * will be joined as a defendant the plaintiff must have a cause of action against it." *Vieux Carre Prop. Owners* v. *Brown*, 875 F.2d 453, 457 (CA5 1989). See also *Davenport* v. *Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (CADC 1999) (adopting *Vieux Carre*). The Ninth Circuit also thought that those rulings might be distinguishable on the ground that in those cases the plaintiffs had directly sought injunctive relief as against the joined party. Pet. App. 12a-13a. Here, by contrast, "[j]oinder is necessary for the 'sole purpose' of effecting complete relief between the parties by ensuring that both Peabody and the Nation are bound to any judgment upholding or striking down

the challenged lease provision." *Id.* 13a-14a (citation omitted).[3]

5. The Ninth Circuit denied rehearing and rehearing en banc. Pet. App. 49a. This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a recurring circuit conflict over the proper construction of a basic rule of civil procedure and to reinstate the careful balance Congress established between the powers of the EEOC and the sovereign interests of government entities such as the Navajo Nation.

I. The Ninth Circuit's Holding That A Party May Be Joined To A Suit Notwithstanding That No Claim May Be Stated Against The Joined Party Is The Subject Of A Square Circuit Conflict.

This Court's intervention is required to resolve an important division among the federal courts regarding the proper application and limits of Federal Rule of Civil Procedure 19.

A. The Ninth Circuit's Decision Conflicts With Precedent From Other Circuits On The Proper Scope Of Rule 19.

The Ninth Circuit in this case relied on that court's settled precedent to hold that a party may be joined to an action under Rule 19 even when no claim may be stated against it and even if Congress has explicitly precluded the plaintiff from suing the absent party directly. Pet. App. 14a (citing also *EEOC* v. *Union Independiente de la Autoridad de*

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[3] The court of appeals separately rejected the district court's holding that the EEOC's suit was barred because it presented a nonjusticiable "political question," Pet. App. 17a, and reinstated the EEOC's unrelated challenge to certain recordkeeping by petitioner, *id.* 18a. Those holdings are not at issue in this petition.

Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 52 (CA1 2002); *Sierra Club* v. *Hodel*, 848 F.2d 1068 (CA10 1988); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (CA6 1974)).

As the court of appeals recognized, the Fifth and D.C. Circuits disagree. In *Vieux Carre Property Owners* v. *Brown*, 875 F.2d 453, 457 (CA5 1989), a community group in New Orleans sought to block private parties and a local government from undertaking an aquarium and park project. The group's theory was that, under the federal Rivers and Harbors Act (RHA), the project first required clearance from the Army Corps of Engineers (Corps). The group sued both the developers and the Corps.

The Fifth Circuit recognized that Congress had provided the Administrative Procedure Act "as a route through which private plaintiffs can obtain federal court review of the decisions of federal agencies," alleged to be in violation of the RHA. 875 F.2d at 456. But the APA provided no such mechanism for adjudicating the private parties' compliance with the RHA. *Ibid.* Moreover, the plaintiffs could not sue the private defendants directly under the RHA because this Court had held that "a private party has no implied right of action for violations of the RHA." *Ibid.* (citing *California* v. *Sierra Club*, 451 U.S. 287 (1981)).

The plaintiffs nonetheless argued that the private parties could be properly joined to their APA suit against the Corps under Rule 19 and, thereby, could be subject to an adjudication under the RHA even though Congress has precluded the plaintiffs from achieving this end directly. 875 F.2d at 456-57 (relying on *Sierra Club* v. *Hodel*, 848 F.2d 1068 (CA10 1988)). The Fifth Circuit rejected that argument for two reasons: one narrow, the other broad. First, the court held that Rule 19 could not be used to circumvent Congress's determination to authorize only the Attorney General to bring suits to enforce the RHA against developers. 875 F.2d at 457. Permitting the plaintiffs to obtain an RHA adjudication

against the developers would, the Court held, "negate[] the Supreme Court's decision in *Sierra Club*" that Congress did not intend for private enforcement of that statute. *Id.* at 457. "As long as the private plaintiff joined the federal agency in the action, the former could reach a nonagency defendant * * *." *Ibid.* Rule 19, the court concluded, could not be used to permit private plaintiffs to sue to enforce the RHA against developers when the statute "explicitly vests that authority in the Attorney General." *Ibid.* "Any other conclusion, we believe, would be too at odds with *Sierra Club*." *Id.* at 457 n.2.[4]

The Fifth Circuit also rejected the plaintiffs' Rule 19 argument on a broader ground, holding that "it is implicit in Rule 19(a) itself that * * * before [a party] will be joined as a defendant the plaintiff must have a cause of action against it." 875 F.2d at 457. Because the plaintiffs had no private right of action to enforce the RHA, they obviously lacked a cause of action against the private developer defendants. *Ibid.*

The Fifth Circuit unquestionably would reject the Ninth Circuit's ruling in this case. The Fifth Circuit held that Rule 19 joinder is prohibited if it would otherwise circumvent a statutory restriction on suing the joined party directly. In reaching that conclusion, the Fifth Circuit notably refused to

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[4] The Fifth Circuit also cited *Dunn* v. *Ca[illegible]*, 110 F.R.D. 439 (S.D. Ind. 1986), aff'd on other grounds, 808 F.2d 555 (CA7 1986), in which the plaintiffs filed suit alleging that the defendant government officials were subjecting pretrial detainees to unconstitutional prison conditions. The parties reached a consent decree under which a new correctional facility would be created and leased to the government. In response, certain taxpayers challenged the lease agreement in state court. The plaintiffs could not sue the taxpayers to preclude their suit, because the Tax Injunction Act forbids interference with such state court litigation. Not only did that statute "deprive[] the Court of jurisdiction over the [taxpayers'] state law claims," but also "therefore the [taxpayers] cannot be joined in this action." *Dunn*, 110 F.R.D. at 440.

follow the Tenth Circuit's decision in *Sierra Club* v. *Hodel*, 848 F.2d 1068 (1988), which the decision below embraces, see Pet. App. 11a-12a.

This case falls *a fortiori* within the Fifth Circuit's reasoning. Just as the Fifth Circuit relied on the fact that no right of action had been implied under the RHA, this case involves a clear prohibition on the EEOC suing the Nation. The Ninth Circuit's holding in this case also conflicts with the Fifth Circuit's broader conclusion that Rule 19 joinder is prohibited unless the plaintiff can state a claim against the joined party. Here, the EEOC is prohibited by statute from seeking even a declaratory judgment against the Nation that its law or the leases it entered with petitioner violate Title VII.[5]

As the Seventh Circuit observed in *EEOC* v. *Elgin Teachers Ass'n*, 27 F.3d 292, 293 (1994), other courts have also rejected similar attempts by the EEOC to circumvent the limits on its power to adjudicate claims against government entities. In *Elgin*, the EEOC sought to challenge a school district's pregnancy leave policies by suing the teacher's union and joining the school board under Rule 19. *EEOC* v. *Elgin Teachers Ass'n*, 658 F. Supp. 624, 625 (E.D. Ill. 1987).

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[5] The Ninth Circuit's expansive interpretation of Rule 19 is also in substantial tension with precedent of the D.C. Circuit. In *Davenport* v. *Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356 (1999), the D.C. Circuit embraced the Fifth Circuit's decision in *Vieux Carre*. In *Davenport*, flight attendants sued their union alleging that it had violated the federal labor laws by entering into an interim labor agreement with an airline. The plaintiffs argued that the airline could be joined under Rule 19. The D.C. Circuit rejected that argument. It did not dispute that the airline was a "necessary party" to the suit as a signatory to the agreement with the union. *Id.* at 366. Rather, it explained in detail that the airline had not itself violated any statute, see *id.* at 361-65, and adopted the Fifth Circuit's view that "while Rule 19 provides for joinder of necessary parties, it does not create a cause of action against them," *id.* at 366.

Unlike the Ninth Circuit, the district court in that case refused to permit the EEOC to proceed indirectly against a government entity it could not sue directly. *Id.* at 624.[6] The district court in *EEOC* v. *American Federation of Teachers, Local No. 571*, 761 F. Supp. 536, 537 (N.D. Ill. 1991), likewise rejected the EEOC's attempt to litigate claims against a school board by joining the board to a suit against a teacher's union. In fact, the court found the EEOC's arguments so lacking in merit that it awarded attorney's fees to the school district, observing that the EEOC had attempted the same ploy twice before in different courts within the judicial district, each time to no avail. *Id.* at 540 (citing *Elgin*, *supra*, and *EEOC* v. *Oak Park Teachers' Ass'n*, 45 Fair Empl. Prac. Cases 446 (N.D. Ill. 1985)). If left unreviewed, the decision of the court of appeals in this case would permit the EEOC to resume these discredited tactics anew in the courts of the Ninth Circuit.

This Court's intervention is moreover required because the circuit conflict is both longstanding and intractable. The split has existed since 1989 (see *Vieux Carre*, 875 F.2d at 456-57 (rejecting Tenth Circuit's reasoning and conclusion in *Hodel*)) and – as evidenced by the Ninth Circuit's acknowledgement in this case of the contrary positions of the Fifth and D.C. Circuits, see Pet. App. 12a-13a – has only become more entrenched.

B. The Ninth Circuit's Attempt To Distinguish Contrary Precedents From Other Circuits Fails.

There is no merit to the Ninth Circuit's suggestion that the cases rejecting its construction of Rule 19 might be distinguishable on the ground that the plaintiffs there sought not only joinder but also an express injunction against the joined party. In *Vieux Carre*, the Fifth Circuit flatly concluded that *joinder* – as opposed to an *injunction* – is precluded when the plaintiff seeks to join the party in order to

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[6] The EEOC did not appeal the dismissal. 658 F. Supp. at 624.

obtain an adjudication Congress has precluded it from obtaining directly. The court did not rely in any respect on the fact that the plaintiffs also expressly sought injunctive relief. To the contrary, it explained that Rule 19 may not be used to circumvent the rule that "a private plaintiff has no right to enjoin *or sue* a nonagency defendant for damages under the RHA." *Vieux Carre*, 875 F.2d at 457 (emphasis added).[7]

Subsequent cases from within the Fifth and D.C. Circuits confirm that those circuits' precedents do not turn on the types of relief sought. See, *e.g.*, *Chavous* v. *District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 154 F. Supp. 2d 40 (D.D.C. 2001) (dismissing city from suit against city's control board and private hospital that sought to void contract between those parties for transfer of public hospital services; court explains that the city's "motion to dismiss the complaint against it also will be granted because the plaintiffs have alleged no cognizable claim against" the city); *Hines* v. *Grand Casinos of Louisiana, LLC*, 140 F. Supp. 2d 701, 705 (W.D. La. 2001) (in discrimination case, declining to join tribe as defendant and explaining that "implicit in Rule 19 is the requirement that the plaintiff have a viable cause of action against the party to be joined as a defendant"; here, "[e]ven if defendant were to establish that the Tribe was plaintiff's employer, plaintiff has no claim against the Tribe under Title VII").

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[7] The D.C. Circuit in *Davenport* did state that "[i]t is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." 166 F.3d at 366. But the court made that statement only after adopting the Fifth Circuit's holding that plaintiffs may sue under Rule 19 only if they can state a claim against the joined party, and the court's point was that the plaintiff must have a "right" to bring the joined party into the case, not that it was seeking an "injunction."

The purported distinction identified by the Ninth Circuit is, in any case, inapplicable here. The EEOC's complaint in this case broadly seeks an injunction against not only petitioner Peabody but also "all persons in active concert or participation with it," Compl. 4, ¶ A – language broad enough to encompass the Navajo Nation. In fact, the EEOC has expressly acknowledged that it is seeking an injunction that would prohibit the Navajo Nation from enforcing the NPEA and its leases with petitioner. Dist. Ct. Trans. 28, reprinted in SER 156 (EEOC seeks "to strike that provision from the lease and *order the Navajo Nation* [not] to enforce that lease provision against Peabody Coal" (emphasis added)). Beyond the order sought directly against the Nation, the *very point* of joining the Nation is to ensure that it is bound by a judgment in the case by res judicata, an effect no different than an injunction as a practical matter.

II. Certiorari Is Warranted In Light Of The Important Sovereign Interests At Stake In The Relationship Between Tribal Governments And The United States.

Certiorari would be warranted even in the absence of a circuit split because the decision below has a "significant impact on the relationship between Indian tribes and the Government." *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). See also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 141 (1972) (granting certiorari "because of the importance of the issues for [certain] Indians"); *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 424 (1943) ("We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States."); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims").

The Ninth Circuit's decision implicates the delicate balance Congress has drawn between the interest of tribal sovereigns in avoiding suit in federal court and the power of federal agencies to enforce federal statutes. The case affects not only the relationship between the tribes and the federal government, but also the distribution of power among federal agencies themselves, a distribution that was designed to protect the interests of tribes and prevent unnecessary friction between tribes and the United States. As discussed below, the decision of the Ninth Circuit contravenes the careful balance Congress struck.

Indian Tribes have a sovereign interest in avoiding not only judgment, but also the indignity of being drawn before a federal court except when and as authorized by Congress. See *Kiowa Tribe of Oklahoma* v. *Mfg. Techs.*, 523 U.S. 751, 754 (1998) (tribes enjoy sovereign immunity to suit, absent waiver by tribe or abrogation by Congress); cf. *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 766 (2002) (sovereign immunity is an immunity from suit, not simply defense to liability). Accordingly, any delay in the resolution of the EEOC's authority to litigate claims against tribes through the device of Rule 19 joinder will not only impose substantial injury to the sovereignty interests of the nation's largest Indian tribe, but will risk similar affronts to the many other tribes that fall within the expansive jurisdiction of the Ninth Circuit. See Pet. for Cert. 27, *United States Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 530 U.S. 1304 (2000) (No. 99-1871) (urging court to grant certiorari despite lack of circuit split because "[t]he Ninth Circuit contains approximately 62% (28 million out of 45.5 million acres) of the lands held by the United States in trust for Tribes and individual Indians, and 400 of the 556 federally recognized Tribes are within that Circuit"); 530 U.S. 1304 (2000) (granting certiorari).

III. Rule 19 May Not Be Used To Circumvent Restrictions Congress Has Placed On A Party's Right To Sue An Absent Party Directly.

There is no dispute that the EEOC is prohibited from bringing an action directly against the Nation to challenge the legality of the Nation's preference requirement. See *supra* at 4. Although Congress designated the EEOC as the primary government enforcer of Title VII for most purposes, it specifically assigned authority to sue governments (including Indian tribes) to the Attorney General. 42 U.S.C. 2000e-5(f)(1). Permitting the EEOC to nonetheless obtain an adjudication against the Nation through Rule 19 joinder would impermissibly allow the Commission "to circumvent congressional intent by a mere pleading device." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

A. Congress Clearly Prohibited the EEOC From Litigating Disputes With Indian Tribes.

In enacting Title VII, Congress crafted a detailed enforcement scheme under which litigation with sovereigns shall be controlled and conducted by the Attorney General, not the EEOC. Those restrictions apply whether the litigation is conducted directly through a suit against the Tribe or indirectly through a suit in which the Tribe is joined as an involuntary defendant.

1. Plain Language of Title VII

The EEOC's actions in this case are, for all practical purposes, indistinguishable from filing a suit for a declaratory judgment against the Nation directly. Whether it sues the Nation directly or joins it under Rule 19, both the purpose and the effect of the EEOC's suit are to haul the Nation before a federal court to obtain a binding adjudication of the legality of the Nation's preference requirement. Indeed, the EEOC admitted as much below. See *supra* at 6.

But the plain language of Title VII prohibits the EEOC from seeking to resolve Title VII disputes with Indian tribes

in court. Section 2000e-5(f)(1) commands that if the EEOC is unable to resolve its differences with a government entity through conciliation, "the Commission *shall take no further action* and *shall refer the case* to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court" (emphases added). This provision makes clear that the discretion to bring a civil action lies with the Attorney General, and not the EEOC. Moreover, whether the Attorney General decides to bring a case or not, the EEOC is plainly prohibited from taking *any* "further action" in the dispute, a phrase that clearly encompasses efforts to join a tribe to an existing case.

In the district court, the EEOC argued that the limitations in Section 2000e-5(f)(1) do not apply to this suit because the EEOC seeks to litigate claims against the Nation in its capacity as a contracting authority, rather than in its capacity as an employer. Subsection (f), the Agency argued, governs suits only against a government "respondent," which is defined in the statute as an "employer" against whom a claim of discrimination is made. See 42 U.S.C. 2000e-5(f)(1). Moreover, the Commission argued, a tribe is specifically excluded from the definition of "employer." See *id.* § 2000e(b). Accordingly, because a tribe cannot be an employer or a "respondent" within the meaning of Title VII, the EEOC reasoned, the restrictions on the EEOC's authority in Section 2000e-5(f)(1) are inapplicable.

The district court rejected that argument, see Pet. App. 36a-37a, and the Ninth Circuit did not disturb its understanding of the statute. If the Nation is not a "respondent" for purposes of Section 2000e-5(f)(1)'s restrictions, it is also not a "respondent" for purposes of the Section's authorization for EEOC litigation. See 42 U.S.C. 2000e-5(f)(1) ("[T]he Commission may bring a civil action against any *respondent* not a government * * *." (emphasis added)). And if the EEOC's litigation with the Nation is not

authorized by Section 2000e-5(f), then the action is not authorized at all.[8] No provision other than Section 2000e-5(f) authorizes the EEOC to litigate claims against the Nation.[9] The authority to litigate against entities that do not meet the definition of "respondent" or "employer" is provided in Section 2000e-6, which authorizes the Attorney General to bring an action against "any person or group of persons [that] is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." While much of this broader authority was subsequently transferred to the EEOC, see Section 2000e-6(d), the power to bring pattern and practice cases against a government entity was retained by the Attorney General, see Reorganization Plan No. 1 of 1978, reprinted in 92 Stat. 3781 (1978); *United States* v. *Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1090-92 (CA9 1979) (discussing history of re-assignment).

Finally, even if the EEOC could lay claim to an implied authority to litigate its claims against the Nation outside of the

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[8] Absent authorization from Congress, a federal agency has no inherent authority to litigate claims in federal court. See, *e.g.*, *United States* v. *City of Philadelphia*, 644 F.2d 187, 198 (CA3 1980). Particularly when Congress has created an express and comprehensive enforcement scheme, further litigating authority beyond the terms provided in the statute cannot be implied. See *ibid.*

[9] In the district court, the EEOC attempted to find an unrestricted source of authority in the introductory paragraph of Section 2000e-5, which provides that the "Commission is empowered, *as hereinafter provided*, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title." 42 U.S.C. 2000e-5(a) (emphasis added). But that authority must, by the provision's plain terms, be exercised "as hereinafter provided." Among the things Congress "hereinafter provided" was that in the case of government entities, the EEOC shall "prevent any person from engaging in an unlawful employment practice" through referrals to the Attorney General, not through independent litigation.

express terms of Title VII, surely that *implied* authority is subject to the same limitations imposed on its *express* statutory authority. As discussed below, a contrary interpretation would be completely incompatible with the purposes for which litigation with government entities has been reserved to the Attorney General.

2. Purposes

Permitting the EEOC to invoke Rule 19 to litigate claims against an Indian tribe is plainly inconsistent with the reasons that led Congress to prohibit the EEOC from bringing such claims directly. The division of litigating authority between the EEOC and Attorney General reflects the special status of suits between the United States and other sovereigns as well as important differences between the EEOC and the Attorney General.

Under our constitutional system, state and local governments "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Indian tribes likewise enjoy a special sovereign status under our constitutional system, forming "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Suits against such sovereigns are not lightly permitted. See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989) (requiring clear statement of congressional intent to subject State to suit); *C & L Enters.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (same for Indian tribe).

It is thus unsurprising that when Congress revised Title VII to permit suits against government employers in 1972, it did so with the reservation that such suits would be instituted only by the Attorney General rather than the EEOC. The Commission is an independent agency with an important, but circumscribed, mission. See 42 U.S.C. 2000e-4. The

Attorney General, on the other hand, is a presidential appointee with broad responsibilities who serves at the pleasure of the President. Congress thus clearly contemplated that litigation against sovereigns should be undertaken by those with greater political accountability than can be expected from the EEOC which is, by design, insulated from political oversight.

Placing litigating authority in the hands of the Attorney General also reflects that the federal government's relationship with government entities, including tribes, is more complex than with ordinary Title VII defendants. States and tribes are not only employers, but also grant recipients, co-operating law enforcement agencies, and frequently entities subject to regulation by administrative agencies. It is especially important in this context for the federal government to speak with one voice, informed by consultation with the wide range of government agencies that have a role in the United States's relationship with other sovereigns.

The general means by which Congress assures uniformity in the federal government's interpretation of federal statutes is by assigning to the Attorney General the dual responsibilities for conducting the Government's litigation and providing authoritative guidance to agencies on the meaning of federal law. See 28 U.S.C. 512, 516; 28 C.F.R. 0.25(a) (describing duties of Office of Legal Counsel within the Department of Justice). Particularly relevant to this case, the Department of Justice serves as the Department of Interior's lawyer, representing it in litigation over mineral leases and providing legal advice to the agency as it administers its responsibility to review and approve lease provisions. See 25 U.S.C. 396a, 396e; 28 U.S.C. 512. Accordingly, in deciding whether to approve the challenged preference provision in this case, the Department of Interior was entitled to seek a legal opinion from the Attorney General. See 28 U.S.C. 512. And if it came to doubt whether that approval was proper in light of the EEOC's new interpretation of Title VII, the Department

could at any time request a legal opinion on the question from the Office of Legal Counsel in the Department of Justice. See 28 C.F.R. 0.25(a). The Attorney General would, moreover, represent the Department of Interior in any litigation arising from a dispute between the Department and the Nation were the Department to require a change in the lease. 28 U.S.C. 516.

The consequences of permitting the EEOC to nonetheless pursue its own interpretation of Title VII in litigation with an Indian tribe are amply illustrated by the facts of this case. The disputed preference terms in this case were subject to review by – and were in fact approved by – the Department of Interior. See Pet. App. 30a, 45-46a. Indeed, the district court noted that the preference provisions were originally "drafted by the United States Secretary of Interior or his authorized representative and presented to [petitioner's predecessor in interest] with no meaningful opportunity to bargain over the employment preference term." *Id.* 29a. The leases have since been modified and extended with the Department's approval. *Ibid.* At no time has the Department sought to rescind approval of the leases or otherwise seek their reformation. *Id.* 46a. Nor has the Department enacted regulations prohibiting such preference terms. At the same time, the Attorney General apparently has never issued a legal opinion concluding that such preferences are illegal or instituted litigation against an Indian tribe seeking to prevent their enforcement. Under these circumstances, the Nation and petitioner should be entitled to rely on the continuing validity of the federally approved preference provisions unless and until appropriate action is taken by the Department of Interior and/or Department of Justice.

Nonetheless, the EEOC has sued petitioner, seeking substantial compensatory and punitive damages because petitioner has done nothing more than comply with the terms of the lease the Department of Interior approved. Rather than attempting to coordinate its position with the Department of Interior and Department of Justice through appropriate inter-

agency channels, the EEOC has sought to challenge the Interior-approved lease provisions in court. Those attempts have already imposed seriously unfair consequences on petitioner, which has relied on the Department of Interior approval in implementing the preference provision.[10]

Congress could have resolved this potential for conflict in a number of ways. It could have provided the EEOC exclusive interpretative authority over Title VII by giving it sole authority to pursue Title VII litigation and to resolve questions regarding the statute arising during the course of other agencies' administrative duties. But Congress clearly rejected that solution, vesting litigating authority instead with the Attorney General. See 42 U.S.C. 2000e-5(f)(1), 2000e-6. In the alternative, Congress could have subjected the EEOC's litigation to supervision by the Attorney General, the general mechanism by which Congress has assured that the federal government speaks with one voice in the federal courts. See 28 U.S.C. 516. But that would have sacrificed a measure of the EEOC's independence, an independence Congress thought important in order for the EEOC to carry out its mission.

Instead, Congress chose another approach, carefully carving out for the Attorney General the particular class of Title VII cases for which it was essential to ensure a coordinated federal position with respect to the rights and obligations of government entities, including Indian tribes.

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[10] Further incongruous results are yet possible, if not in this case, then in others. The Attorney General is responsible not only for representing the interests of the Department of Interior in court, 28 U.S.C. 516, but also frequently participates in litigation to protect the interests of tribes. See, *e.g.*, *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 657 (1979); see also 28 C.F.R. 0.65(b). Allowing the EEOC to sue a tribe based on a legal theory the Department of Interior and Attorney General reject could foreseeably lead to the embarrassment of the federal government appearing on both sides of the same case in federal court.

Permitting the EEOC to nonetheless litigate claims against an Indian tribe through the mechanism of a Rule 19 joinder is completely incompatible with the carefully calibrated solution Congress enacted. The Ninth Circuit's ruling approving the EEOC's position raises the same prospect for drawing courts into inter-agency conflicts, and creates the same unfairness to tribes and their contracting partners, as the direct suit that even the EEOC acknowledges it is prohibited from bringing.

3. Statutory Provisions Limiting Suits Against Government Entities Must Be Strictly Enforced.

The same sovereignty interests that led Congress to assign to the Attorney General the decision whether and how to litigate Title VII claims against government entities also require strict enforcement of the limitations on such suits established by the statute.

It is well established that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma* v. *Mfg. Techs.*, 523 U.S. 751, 754 (1998). While Congress has plenary authority to remove that immunity, courts will assume that the immunity is intact unless Congress has made its decision to abrogate the tribes' immunity abundantly clear. See *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."). Suits against States are likewise precluded absent express Congressional authorization. See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989)

It is also within Congress's power to impose limits or conditions on suits against States and tribes, and when it does so, those limits and conditions must be respected. See, *e.g.*, *Kiowa Tribe*, 523 U.S. at 759. Strict adherence to such limitations is required both in order to respect Congress's intentions and to protect the tribe's right to have its immunity removed only in the manner approved by Congress.

To be sure, as the Ninth Circuit observed, a tribe may not invoke sovereign immunity against the United States itself. Pet. App. 10a. But whether and how the federal government has power to sue a tribe is a matter for Congress to determine. Just as Congress may decline to permit private individuals to sue tribes, so too it may preclude the executive branch from suing a tribe, or it may prescribe conditions and procedures for such suits. And just as the limitations imposed by Congress for private suits against tribes must be strictly adhered to, the conditions and procedures Congress establishes for federal government suits must also be strictly enforced.

B. Rule 19 May Not Be Used To Circumvent Limits Congress Has Established On A Party's Ability To Sue.

Because Congress has clearly withheld from the EEOC the right to adjudicate claims against Indian tribes, the EEOC is likewise precluded from relying on Rule 19 to seek to litigate the same claims with a tribe.

As the text of Rule 19 reflects, there are occasions on which an otherwise necessary party "cannot be made a party." Fed. R. Civ. P. 19(b). Rule 19 does not itself purport to be the source of the barriers to joinder, but rather simply acknowledges that other sources of substantive law may preclude the joinder of a party to a particular case in some circumstances. Thus, the rule acknowledges that 28 U.S.C. 1332 precludes joinder of a party when doing so would destroy the diversity of citizenship upon which a court's subject matter jurisdiction is based. Fed. R. Civ. P. 19(a). Other substantive barriers to joinder are not mentioned specifically in the Rule. For example, as the Ninth Circuit and other courts have held, a court may not join an Indian tribe to a case when Congress has not authorized a suit against the tribe, because doing so would vitiate the tribe's common law immunity from suit. See, *e.g.*, *Dawavendewa* v.

Salt River Project Agr. Improvement & Power Dist., 276 F.3d 1150, 1153 (CA9 2002).[11]

Common law immunities are simply one way in which the law precludes a plaintiff from adjudicating a claim against a particular party. Congress may also forbid such suits by assigning the responsibility for adjudicating such claims to someone else, often the government, or in this case a particular agency within the government. Thus, when Congress declines to authorize a private right of action, it makes clear its intent that the obligations imposed by the law shall be enforced only in a particular matter. Rule 19 may no more be used to circumvent this prohibition than it may be used to avoid a claim of immunity from suit. See *Vieux Carre*, 875 F.2d at 456-58. Similarly, in this case, the EEOC may not use Rule 19 to avoid Congress's restrictions on its authority to sue an Indian tribe.

To conclude otherwise draws Rule 19 into conflict with the Rules Enabling Act, 28 U.S.C. 2072(b). "[N]o reading of the Rule can ignore the Act's mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (citations and internal quotation marks omitted). "The test must be whether a rule really regulates procedure[] – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna* v. *Plumer*, 380 U.S. 460, 464 (1965) (internal quotation marks

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[11] Like state sovereign immunity, which is "a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction," *Idaho* v. *Coeur D'Alene Tribe*, 521 U.S. 261, 267 (1997), tribal immunity does not affect the subject matter jurisdiction of the federal courts. See, *e.g*, *Ninigret Dev. Corp.* v. *Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (CA1 2000); *Kreig* v. *Prairie Island Dakota Sioux (In re Prairie Island Dakota Sioux)*, 21 F.3d 302, 304 (CA8 1994) (per curiam).

omitted). Whether a tribe may be subjected to an adjudication of its rights and obligations, and at whose insistence, is a question of substantive law, one that must be resolved by Congress. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). There would be little doubt, for example, that a Rule could not establish a private right to enforce a statute that does not, itself, contemplate private enforcement. Cf. *id.* at 289-91 (when Congress authorized agency to promulgate regulations to "effectuate" statutory requirements, regulations may not themselves create a private right of action). Nor could the Rules authorize the EEOC to litigate claims against an Indian tribe when Congress has assigned that authority to someone else. Cf. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (interpreting Rules to govern preclusive effect of federal judgment "would arguably violate" Enabling Act's prohibition against modification of substantive rights); *Ortiz*, 527 U.S. at 842 (adopting a "limiting construction" of class action rule to "minimize[] potential conflict with the Rules Enabling Act").

Hence, when Congress has precluded one party from directly adjudicating a claim against another, that prohibition may not be circumvented by adverting to Rule 19. This principle applies whether the barrier to direct suit arises from a lack of jurisdiction (personal or subject matter), because the absent party enjoys an immunity to a direct suit, or because Congress has assigned the right to adjudicate the issue with the absent party to another, either by declining to create a private right of action (see *Vieux Carre*, 875 F.2d at 456-58) or, as here, by assigning enforcement responsibilities to a specific federal agency to the exclusion of another.

Contrary to the Ninth Circuit's opinion, see Pet. App. 13a, petitioner's view is consistent with decisions such as *General Building Contractors Ass'n* v. *Pennsylvania*, 458

U.S. 375, 399 (1982).[12] In that case, this Court held that an innocent employer could be joined and subject to a modification of its contract with a union if necessary to remedy the union's history of race discrimination in violation of 42 U.S.C. 1981. 458 U.S. at 400-01. There was nothing in Section 1981 or any other federal statute that indicated that Congress intended to protect innocent employers from such adjudications or obligations, or limit the class of parties who could seek such relief. In contrast, Congress has made clear in this case that any Title VII litigation seeking a modification of the rights and responsibilities of an Indian tribe must be prosecuted by the Attorney General.

Nor does petitioner's position conflict with other ordinary uses of Rule 19 approved in this Court's prior cases. For example, in *Martin* v. *Wilks*, 490 U.S. 755, 763-65 (1989), this Court indicated that Rule 19 would apply to permit the joinder of white firefighters to a race discrimination suit by their African American colleagues against the fire department. Joinder would permit the white firefighters to object to any proposed remedy in the case that might adversely affect their employment rights. Petitioner's view does not preclude joinder in such cases. The joinder of parties who might have grounds to object to the relief requested by the plaintiff is, in essence, the equivalent of a declaratory judgment action by the plaintiff against the absent party to resolve those objections. So long as there would be no impediment to the plaintiff bringing that request for a declaratory judgment directly against the absent party, Rule 19 permits the joinder. However, when the plaintiff is precluded from bringing a direct action – when, for example, the absent party is a State or an Indian tribe that enjoys

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[12] See also *Zipes* v. *TWA*, 455 U.S. 385, 399-400 (1982); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095-96 (CA6 1974).

immunity from suit – the plaintiff cannot achieve the prohibited result indirectly through Rule 19 joinder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 15, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-17305

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,
v.
PEABODY WESTERN COAL COMPANY,
Defendant-Appellee.

March 3, 2005, Resubmitted
March 10, 2005, Filed

COUNSEL: Benjamin N. Gutman (Argued), EEOC, Washington, D.C., Ralph E. Chamness, Katherine Kruse, EEOC, Phoenix, Arizona, for the plaintiff-appellant.

Lawrence Jay Rosenfeld, Mary E. Bruno, John F. Lomax, Jr., Greenberg Traurig, Phoenix, Arizona, for the defendant-appellee.

JUDGES: Before: Procter Hug, Jr., Arthur L. Alarcon, and William A. Fletcher, Circuit Judges. Opinion by Judge William A. Fletcher.

OPINION

W. FLETCHER, Circuit Judge:

The Equal Employment Opportunity Commission ("EEOC") filed this action against Peabody Western Coal Company ("Peabody") for maintaining a Navajo hiring preference at the mines that Peabody leases from the Navajo Nation. The EEOC alleges that Peabody has discriminated against non-Navajo Native Americans, including two

members of the Hopi Nation and one member of the Otoe tribe, in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

On appeal, we are presented with three questions. The first is whether, under Federal Rule of Civil Procedure 19, it is feasible to join the Navajo Nation as a party. We hold that it is feasible to join the Nation in order to effect complete relief between the parties. Because the EEOC is an agency of the United States, the Navajo Nation cannot assert its sovereign immunity as a defense to joinder. The second is whether the EEOC's claim presents a nonjusticiable political question. We hold that it does not. The third is whether the district court erred in dismissing the EEOC's claim that Peabody failed to keep records as required by Title VII, 42 U.S.C. § 2000e-8(c). We hold that it did. We reverse and remand for further proceedings.

I. Background

Peabody mines coal at the Black Mesa Complex on the Navajo and Hopi reservations in northeastern Arizona. It does so pursuant to leases with the tribes entered into by Peabody's predecessor-in-interest, the Sentry Royal Company ("Sentry"). Sentry entered into two leases with the Navajo Nation: a 1964 lease allowing it to mine on the Navajo Nation's reservation (lease no. 8580), and a 1966 lease allowing it to mine on the Navajo portion of land set aside for joint use by the Navajo and Hopi Nations (lease no. 9910). Both leases contain provisions requiring that preference in employment be given to members of the Navajo Nation. The 1964 lease provides that Peabody "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified," and that Peabody "shall make a special effort to work Navajo Indians into skilled, technical, and other higher jobs in connection with [Peabody's] operations under this lease." The 1966 lease contains a similar provision, but also specifies that Peabody may "at its option extend the benefits of this Article [containing the Navajo employment preference] to Hopi

Indians." The record indicates that the language of the Navajo employment preferences remains unchanged and does not show that the preference has been extended to members of the Hopi Nation.

Pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"), the Department of Interior has approved both the leases, as well as subsequent amendments and extensions. *See* 25 U.S.C. §§ 396a, 396e; *see also United States v. Navajo Nation*, 537 U.S. 488, 493 (2003) (explaining that the Department of the Interior's approval is necessary before the leases become effective). If the lease terms are violated, the Navajo Nation and the Department of the Interior ("DOI") retain the power to cancel the leases after a notice and cure period.

In June 2001, the EEOC filed this action in District Court for the District of Arizona, alleging that Peabody was unlawfully discriminating on the basis of national origin by implementing the Navajo employment preference. Specifically, the EEOC's complaint charged that Peabody had refused to hire non-Navajo Native Americans – two members of the Hopi and one now-deceased member of the Otoe tribe, as well as unspecified other non-Navajo Native Americans – for positions for which they were otherwise qualified. The EEOC argued that such conduct violated 42 U.S.C. § 2000e-2(a)(1), which prohibits employers from refusing to hire applicants because of their national origin. The complaint further alleged that Peabody had violated the record-keeping requirements of § 2000e-8(c).

Questions arising out of transactions, including coal mining leases, on the Navajo and Hopi reservations and on the tribes' joint land have been extensively litigated. *See, e.g.*, *Navajo Nation*, 537 U.S. at 493-513 (rejecting claim by Navajo Nation that the Secretary of the Interior breached fiduciary duties owed to the Nation by approving the coal leases); *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 946 (9th Cir. 2004) (holding that the court lacked jurisdiction

to enforce arbitration settlement agreement about lease royalty rates); *see also Clinton v. Babbitt*, 180 F.3d 1081, 1083-86 (9th Cir. 1999) (describing the lengthy dispute between Navajo and Hopi Nations over joint use land in Arizona); *Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 275-76 (D.D.C. 2002) (describing history of amendments to the leases in a RICO suit by the tribe against Peabody).

Navajo employment preference provisions also have been the subject of prior litigation. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1163 (9th Cir. 2002) ("*Dawavendewa II*"); *Dawavendewa v. Salt River Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1124 (9th Cir. 1998) ("*Dawavendewa I*"). In *Dawavendewa I*, we interpreted the Indian preference exception of Title VII, § 2000e-2(i), to permit discrimination in favor of Indians living on or near a reservation, but not to permit discrimination against Indians belonging to other tribes. *Id.* at 1124. On remand to the district court, the private contractor defendant moved to dismiss the case for failure to join the Navajo Nation as an indispensable party under Federal Rule of Civil Procedure 19(b).

In *Dawavendewa II*, 276 F.3d at 1153, we agreed with the district court that the Navajo Nation was an indispensable party. We held that "as a signatory to the lease . . . the Nation is a necessary party that cannot be joined because it enjoys tribal sovereign immunity." *Id.* We noted when balancing the factors to determine whether the Nation was an indispensable party that the plaintiff

> may have a viable alternative forum in which to seek redress. Sovereign immunity does not apply in a suit brought by the United States. Moreover, recently, in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001), we held that because no principle of law 'differentiates a federal agency such as the EEOC from the United

> States itself,' tribal sovereign immunity does not apply in suits brought by the EEOC.

Id. at 1162-63. When the EEOC moved "at the eleventh hour" to intervene, we denied the motion. We observed, however, "that nothing precludes Dawavendewa from refiling his suit in conjunction with the EEOC." *Id.* at 1163.

In June 2002, the EEOC brought the present action, alleging intertribal discrimination as in *Dawavendewa I* and *Dawavendewa II*. In February 2002, Peabody moved for summary judgment under Federal Rule of Civil Procedure 56 and for dismissal of the action under Federal Rules of Civil Procedure 12(b)(7) and 12(b)(1). Peabody neither admitted nor denied that it had discriminated against non-Navajo Native Americans in violation of Title VII. Instead, Peabody asserted that Rule 19 required dismissal because the Navajo Nation was a necessary and indispensable party. Peabody also asserted that the issue of the legality of this lease provision was a nonjusticiable political question, on the theory that because the DOI had approved the mining leases, the court would have to make an "initial policy choice" between the positions of the DOI and the EEOC.

The district court held that it was not feasible to join the Navajo Nation, and that the Nation was not only a necessary but also an indispensable party. In the alternative, it found the legality of the Navajo employment preference in the lease to be a nonjusticiable political question. The district court dismissed the entire action, including the EEOC's record-keeping claim. The EEOC timely appealed. We reverse and remand for further proceedings.

II. Discussion

A. Joining the Navajo Nation Under Rule 19

Rule 19 governs compulsory party joinder in federal district courts. The district court held that it was not feasible to join the Navajo Nation because, under Title VII, the EEOC cannot directly sue the Nation. *See* 42 U.S.C. § 2000e(b)(1) (exempting Indian tribes from the statutory definition of

"employer"); *see also Dawavendewa II*, 276 F.3d at 1159 n.9 (observing that "pursuant to § 2000e(b), Indian tribes are specifically exempt from the requirements of Title VII"). Although the district court decided the issue on a motion for summary judgment, we construe the motion as one to dismiss for failure to join an indispensable party under Rule 12(b)(7). *See Dredge Corp. v. Penny*, 338 F.2d 456, 463-64 (9th Cir. 1964) (explaining that dismissal for failure to join a party must be decided on a motion to dismiss, not summary judgment). We review de novo the district court's legal conclusion that it is not feasible to join the Navajo Nation. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (explaining that although "generally, we review a district court's decision regarding joinder for abuse of discretion[,] . . . . we review legal conclusions underlying that decision de novo") (internal citation and quotation marks omitted).

We hold that the Navajo Nation is a necessary party under Rule 19. We hold, further, that where the EEOC asserts a cause of action against Peabody and seeks no affirmative relief against the Nation, joinder of the Nation under Rule 19 is not prevented by the fact that the EEOC cannot state a cause of action against it. Because the EEOC is an agency of the United States, the Nation cannot object to joinder based on sovereign immunity, as we noted in *Dawavendewa II*. 276 F.3d at 1162-63. We therefore hold that joinder of the Nation is feasible.

1. Rule 19

In relevant part, Rule 19(a) provides that

> [a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of

> the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. . . . If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 19(b) provides that if it is not feasible for the court to join a person meeting the requirements of Rule 19(a), the court

> . . . shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court [in determining whether a party is indispensable] include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Applying these two parts of Rule 19, there are three successive inquiries. *Bowen*, 172 F.3d at 688 (describing Rule 19's "three-step process"). First, the court must determine whether a nonparty should be joined under Rule 19(a). We and other courts use the term "necessary" to describe those "persons to be joined if feasible." Fed. R. Civ. P. 19(a); *see also Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 867 n.5 (9th Cir. 2004) (explaining that

the term "necessary" is a "term[] of art in Rule 19 jurisprudence"); *Bowen*, 172 F.3d at 688. If understood in its ordinary sense, "necessary" is too strong a word, for it is still possible under Rule 19(b) for the case to proceed without the joinder of the so-called "necessary" absentee. In fact, Rule 19(a) "defines the persons whose joinder in the action is *desirable*" in the interests of just adjudication. Fed. R. Civ. P. 19 Advisory Committee Note (1966) (emphasis added); *see also Bowen*, 172 F.3d at 688. Absentees whom it is desirable to join under Rule 19(a) are "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act[.]" *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854).

If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, when the absentee is not subject to personal jurisdiction, and when joinder would destroy subject matter jurisdiction. *See* Fed. R. Civ. P. 19(a); *see also Tick v. Cohen*, 787 F.2d 1490, 1493 (11th Cir. 1986) (listing the three factors that may make joinder unfeasible).

Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an "indispensable party" such that the action must be dismissed. As the Advisory Committee Note explains, Rule 19 uses "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors [in Rule 19(b)], it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." Fed. R. Civ. P. 19 Advisory Committee Note (1966). Indispensable parties under Rule 19(b) are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final

termination may be wholly inconsistent with equity and good conscience." *Shields*, 58 U.S. at 139.

2. The Navajo Nation as a Necessary Party

The EEOC and Peabody agree, as they did in district court, that the Navajo Nation is a necessary party under Rule 19(a)(1) because the Nation is a party to the lease with Peabody. For the sake of clarity, we explain why we also agree. Rule 19(a) is "concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983) (citing Advisory Committee's Note Fed. R. Civ. P. 19 (1966)). As in *Dawavendewa II*, 276 F.3d at 1156, the Nation is a signatory to lease provisions that the plaintiff challenges under Title VII. The EEOC seeks declaratory, injunctive, and monetary relief. If the EEOC is victorious in its suit against Peabody, monetary damages for the charging parties can be awarded without the Nation's participation. But declaratory and injunctive relief could be incomplete unless the Nation is bound by res judicata. The judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts. But it will preclude the Nation from bringing a collateral challenge to the judgment. If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could possibly initiate further action to enforce the employment preference against Peabody, even though that preference would have been held illegal in this litigation. Peabody would then be, like the defendant in *Dawavendewa II*, 276 F.3d at 1156, "between the proverbial rock and a hard place – comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it." By similar logic, we have elsewhere found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise. *See Pit River Home v. United States*, 30 F.3d 1088, 1092 (9th

Cir. 1994) (Pit River Tribal Council was a necessary party in suit challenging its designation by the Secretary of Interior as the beneficiary of reservation property); *Confederated Tribes of Chehalis Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991) (Quinault Nation was a necessary party in suit challenging the United States' continued recognition of the Nation as sole governing authority of the Quinault Indian Reservation). Following these cases, we conclude that the Navajo nation is a necessary party under Rule 19(a).

3. Feasibility of Joinder

We turn next to the issue of whether it is feasible to join the Navajo Nation. Peabody does not contest that the court could exercise personal jurisdiction over the Nation. Rather, Peabody argues that the district court lacked jurisdiction because of the Nation's sovereign immunity.

In many cases in which we have found that an Indian tribe is an indispensable party, tribal sovereign immunity has required dismissal of the case. *See, e.g., Dawavendewa II*, 276 F.3d at 1163; *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1027 (9th Cir. 2002). By contrast, in a suit brought by the EEOC, the Nation's tribal sovereign immunity does not pose a bar to its joinder. Tribal sovereign immunity does not "act as a shield against the United States," even when Congress has not specifically abrogated tribal immunity. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987). Because the EEOC is an agency of the United States, "tribal sovereign immunity does not apply in suits brought by the EEOC." *Dawavendewa II*, 276 F.3d at 1162-63; *Karuk*, 260 F.3d at 1075.

Peabody argues, however, that the district court lacked the authority to join the Nation because the EEOC cannot state a claim against an Indian tribe under Title VII. The parties agree that the EEOC cannot sue an Indian tribe under Title VII regarding the tribe's own employment practices.

Under § 2000e(b), an Indian tribe is specifically exempt from the definition of "employer," and thus Title VII does not apply to Indian tribes when they act as employers. In addition, Title VII limits the EEOC's authority to proceed against "a respondent which is a government, governmental agency, or political subdivision." 42 U.S.C. § 2000e-5(f)(1). In the case of a governmental respondent, if the EEOC fails to resolve the matter by informal means, the EEOC "shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent." *Id.*

However, a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19. In *Beverly Hills Federal Savings and Loan Association v. Webb*, 406 F.2d 1275, 1279-80 (9th Cir. 1969), we stated that "a person may be joined as a party [under Rule 19(b)] for the sole purpose of making it possible to accord complete relief between those who are already parties, even though no present party asserts a grievance against such person." We held that a title company acting as a trustee for some of the defendants' property was properly named as a defendant "for the *sole purpose* of 'facilitating' the enforcement of any orders that might be made by the court with respect to the trust or the trust property." *Id.* at 1279 (emphasis added). We so held even though the plaintiff did not "assert any claim against the Title Company with respect to which [the district] court has subject matter jurisdiction." *Webb*, 406 F.2d at 1279 (emphasis added).

In *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1344-45 (9th Cir. 1995), we held that private parties could be named as defendants along with federal agencies in a suit brought under the Administrative Procedure Act to enforce rights conferred by the National Environmental Policy Act and by the Food, Agriculture, Conservation and Trade Act of 1990. Although none of these statutes authorized causes of action against the private parties, we held that Rule 19 nonetheless authorized their joinder as defendants. *Id.* In so holding, we cited *Sierra Club v. Hodel*, 848 F.2d 1068, 1077

(10th Cir. 1988), in which the Tenth Circuit held that joinder of a county was proper in an action under the Administrative Procedure Act against a federal agency, even though the plaintiff could not sue the county directly.

Our circuit's reading of Rule 19 not to require a cause of action between a plaintiff and a party sought to be joined under the rule is consistent with Supreme Court precedent. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 356 (1977), the Supreme Court held that a labor union named as a defendant was not liable for any discrimination. Thus, the plaintiff had no viable cause of action against the union. Accordingly, the Court vacated a district court injunction against the union. Nevertheless, the Supreme Court wrote that "the union will properly remain in this litigation as a defendant so that full relief may be awarded the victims of the employer's post-Act discrimination." *Id.* at 356 n.43 (citing Fed. R. Civ. P. 19(a); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095 (6th Cir. 1974)). The Supreme Court reaffirmed *Teamsters*' approach to Rule 19 in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 400 & n.14 (1982) (reiterating the Supreme Court's holding in *Teamsters*, 431 U.S. at 356, n.43).

We recognize that the Fifth Circuit has stated that "it is implicit in Rule 19(a) itself that before a party . . . will be joined as a defendant the plaintiff must have a cause of action against it." *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989); *see also Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999) (quoting this statement from *Vieux Carre*). However, our circuit has never agreed with the rule stated in *Vieux Carre*. Moreover, the actual holdings of *Vieux Carre* and *Davenport* (as distinct from their abstract statement of the rule) can be reconciled with the Supreme Court's and with our own Rule 19 cases. In *Vieux Carre* and *Davenport*, the courts were answering different questions from the question in this case. In *Vieux Carre*, the issue was whether the court could join

under Rule 19 and then impose an injunction directly on a party against whom the plaintiff could not state a cause of action. The court held it could not. 875 F.2d at 456-57. In *Davenport*, the issue was the same as in *Vieux Carre*. 166 F.3d at 366. The D.C. Circuit held in *Davenport*, "it is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." *Id.*

The difference between the situation presented here, in which plaintiffs seek no affirmative relief against the Navajo Nation, and that in *Vieux Carre* and *Davenport*, in which plaintiffs sought injunctions against the party sought to be joined, is captured in the majority and concurring opinions in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982). In *General Building*, the Supreme Court held that injunctive relief to enforce Title VII rights could not be granted against employers who were "parties found not to have violated any substantive rights of [the plaintiffs]." *Id.* at 399. The Court, however, also clarified that "this is not to say that [the employer] defendants . . . might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even [be] subject to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief." *Id.* (citing *Zipes*, 455 U.S. at 399-400). In her concurrence, Justice O'Connor emphasized this point, observing that even though the Court in *Teamsters v. United States*, 431 U.S. 324 (1977), had found that the union had not violated Title VII, it had nonetheless "directed the union [under Rule 19] to remain in the litigation as a defendant so that full relief could be awarded the victims of the employer's post-Act discrimination." *Id.* at 405 (O'Connor, J., concurring) (quoting *Zipes*, 455 U.S. at 399-400).

As in *Teamsters*, *Espy*, and *Webb*, the EEOC has no claim against the party it seeks to join and is not seeking any affirmative relief directly from that party. Joinder is necessary

for the "sole purpose" of effecting complete relief between the parties, *Webb*, 406 F.2d at 1279-80, by ensuring that both Peabody and the Nation are bound to any judgment upholding or striking down the challenged lease provision. Because the EEOC is not seeking to hold the Navajo Nation liable under Title VII, we reject Peabody's argument that our reading of Rule 19 conflicts with the Rules Enabling Act's restriction that the federal rules of civil procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Joinder of the Nation does not, and cannot, create any substantive rights that the EEOC may enforce against the Nation, and the EEOC does not contend otherwise.

Our interpretation is consistent with other courts that have allowed the EEOC to join a party under Rule 19 against which it does not or cannot state a cause of action. In *EEOC v. Union Independiente de la Autoridad de Acueductos*, 279 F.3d 49, 52 (1st Cir. 2002), for example, the EEOC filed a complaint against a labor union for alleged discrimination against an employee. The First Circuit observed without disapproval that the EEOC had named a Puerto Rican governmental employer as a Rule 19 defendant "to ensure that complete relief, including [the employee's] reinstatement, was available." *Id.* Under Peabody's theory of Rule 19 and Title VII, the EEOC would not have had statutory authority to join a government as an employer because it could not sue that employer directly. *See* 42 U.S.C. § 2000e-5(f)(1) (granting authority to litigate against a government respondent to the Attorney General). In *EEOC v. MacMillan Bloedel*, the Sixth Circuit held that it was proper to join a union under Rule 19, although the union was not charged with a Title VII violation. 503 F.2d at 1088. The court so held "because the decree entered by the court might affect its collective bargaining agreement[.]" *Id.* at 1095. "As a practical matter," the Sixth Circuit observed, "the Union need not play a role in the litigation until the court finds that [the employer] has violated Title VII." *Id.*; *see also id.* at 1096 (citing cases in which union was joined in order to participate

in the remedy). We agree with the Sixth Circuit in *MacMillan Bloedel* that our understanding of Rule 19 is "consistent with Title VII's grant of broad equitable powers to the courts to eradicate the present and future effects of past discrimination." 503 F.2d at 1095-96. *See also Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (stating that Congress intended to give the EEOC "broad enforcement powers.").

Our interpretation of Rule 19 is also consistent with both the purpose and text of the rule. The Northern District of California provided a succinct statement of this purpose when it explained that "by definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests." *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F. Supp. 506, 518 (N.D. Cal. 1977). The Nation fits this definition – it is a party against which relief has not formally been sought but is so situated that effectiveness of relief for the present parties will be impaired if it is not joined. We hold that its joinder is feasible. *See* Fed. R. Civ. P. 19(a).

Finally, we note what we do, and do not, decide today. We do decide that the Navajo Nation is a necessary party that is feasible to join under Rule 19(a). However, we do not decide, even implicitly, the merits of the EEOC's Title VII suit against Peabody. That determination is for the district court on remand.

B. Political Question Doctrine

We next address the district court's ruling that the case involves a nonjusticiable political question. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six factors that may make a question nonjusticiable:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable

> and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. *See also Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) (quoting the six *Baker* factors). The *Baker* factors must be interpreted in light of the purpose of the political question doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Association v. Am. Cetacean Society*, 478 U.S. 221, 230 (1986).

The district court misunderstood the political question doctrine when it held that the third, fourth, and sixth *Baker* factors were implicated by the EEOC's claim. A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis. *See Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). While it is true that the EEOC is challenging a lease that the DOI has approved, the district court was not called upon to make an "initial policy determination." Resolving whether and how Title VII applies is a matter of statutory interpretation and thus involves simply implementing policy determinations Congress has already made. The issues here are entirely legal, and are of a sort "familiar to the courts. " *Eu*, 979 F.2d at 702.

Nor do the fourth and fifth *Baker* factors apply merely because, at the behest of the EEOC, the district court was asked to rule on the legality of a lease that the DOI had approved. We regularly review the actions of federal agencies to determine whether they comport with applicable law. *See Japan Whaling Ass'n*, 478 U.S. at 230 (explaining that the political question doctrine did not bar a challenge to the Secretary of Commerce's action when a decision required "applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented"). Nor do controversies between departments of the federal government necessarily present political questions. *See, e.g., United States v. Nixon*, 418 U.S. 683, 693 (1974) (dispute between the President and the Special Prosecutor); *United States v. ICC*, 337 U.S. 426, 430 (1949) (suit by the United States to review decision of the Interstate Commerce Commission); *TVA v. EPA*, 278 F.3d 1184, 1198 (11th Cir. 2002) (dispute between federal agencies about the meaning of the Clean Air Act). We therefore conclude that no part of this case presents a nonjusticiable political question.

C. Record-Keeping Claim

We turn finally to the EEOC's record-keeping claim. Title VII requires a covered employer to make and preserve records that are "relevant to the determinations of whether unlawful employment practices have been or are being committed." 42 U.S.C. § 2000e-8(c). In its complaint, the EEOC alleged that Peabody had failed to keep employment applications and sought an injunction directing Peabody to do so. Peabody has a record-keeping obligation under Title VII unrelated to the challenged Navajo employment preference. Although the district court did not explicitly discuss or analyze this claim, its entry of final judgment nonetheless effectively dismissed it.

Peabody's motion for summary judgment did not mention the record-keeping claim, and its motion to dismiss

argued only that the EEOC was not entitled to a jury trial on the claim. In the absence of argument by the parties, fair notice to the EEOC that its record-keeping claim faced dismissal, or any justification offered by the district court for entering summary judgment on the claim, we vacate the judgment as to the EEOC's record-keeping claim and remand for further proceedings. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (the moving party "bears the initial responsibility of informing the district court of the basis for its motion"); *Couveau v. American Airlines, Inc.*, 218 F.3d at 1081 (observing that when the reasons for the district court's decision are not clear, we may vacate summary judgment and remand).

Conclusion

We do not decide the merits of the EEOC's Title VII claim against Peabody today. We hold simply that the Navajo Nation is a necessary party to the action, and that it is feasible to join the Nation in order to effect complete relief between the parties. We also hold that the EEOC's suit does not present a non-justiciable political question. Finally, we reverse the district court's dismissal of the EEOC's record-keeping claim. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 01-1050-PHX-MHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
vs.
PEABODY COAL COMPANY,
Defendant.

September 24, 2002, Decided
September 26, 2002, Filed

COUNSEL: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Mary Joleen O'Neill, Esq, Katherine J Kruse, Equal Employment Opportunity Commission, Phoenix, AZ.

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For DELBERT MARIANO, THOMAS SAHU, intervenors: Tod F Schleier, Esq, Bradley Hugh Schleier, Esq, James M Jellison, Schleier Jellison & Schleier PC, Phoenix, AZ.

ORDER

Pending before this Court are the following motions: Defendant's Motion for Summary Judgment (Doc. # 38); Defendant's Motion to Dismiss and/or Stay and/or Motion to Strike (Doc. # 24); Plaintiff's Motion to Strike Portions of the Statement of Facts and Affidavits Submitted by Defendant in Support of its Motion for Summary Judgment (Doc. # 43); Defendant's Motion to Strike Plaintiff's Reply in Support of

Plaintiff's Motion to Strike as Untimely (Doc. # 49); and Delbert Mariano and Thomas Sahu's Motion to Intervene as Plaintiffs (Doc. # 23).

I. FACTUAL BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") has filed this Complaint against Peabody Western Coal Company ("Peabody Coal") claiming a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § § 2000e *et seq.*

Specifically, the EEOC alleges that Peabody Coal violates Title VII's prohibitions against national original discrimination by giving preference in hiring to Navajos over non-Navajo Native Americans at its coal mining operations located on the Navajo and Hopi Indian Reservations (the "Black Mesa Complex").

The EEOC claims that Delbert Mariano and Thomas Sahu, members of the Hopi Tribe, and Robert Koshiway, a member of the Otoe Tribe (now deceased), applied for positions with Peabody Coal and were denied employment in favor of members of the Navajo Nation. Before filing this lawsuit against Peabody Coal, the EEOC engaged in some informal conciliation. The conciliation process failed to resolve the matter, and this lawsuit was filed.

A. THE COAL LEASES

Peabody Coal conducts coal mining operations on the Navajo and Hopi Reservations in northeastern Arizona pursuant to drilling and exploration permits and coal mining leases executed with the respective tribes.[1] These permits and coal leases require Peabody Coal to provide preference in employment to members of the respective tribes. These permits and coal leases also require approval of the United

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[1] These operations provide coal to the Salt River Project Agricultural Improvement and Power District generating station in Page, Arizona, and to Southern California Edison's Mojave generating station.

States Secretary of the Interior under certain circumstances. Specifically, these provisions are as follows.

1. The 1961 Navajo Permit

The Drilling and Exploration Permit executed on May 13, 1961 between The Navajo Tribe of Indians and Sentry Royalty Company, Peabody Coal's predecessor in interest, provides in pertinent part:

> 9. Permittee shall commence prospecting operations for coal within ninety (90) days of the approval of this permit by the Secretary of the Interior ...
>
> 10. Permittee will employ members of the Navajo Tribe when available in all positions for which they are qualified and pay prevailing wages to such Navajo employees. Permittee will make a special effort to work members of the Navajo Tribe into skilled, technical and other jobs in connection with its operations under this permit.
>
> ***
>
> 12. This permit shall not be assignable without approval of the Advisory Committee of the Navajo Tribal Counsel and the Secretary of the Interior.

This Drilling and Exploration Permit (the "1961 Navajo Permit") was signed and is dated February 6, 1962, by James F. Canan, assistant area director, Bureau of Indian Affairs, Department of the Interior. Article XIX of the form Lease attached as Exhibit B to the 1961 Navajo Permit" also contains a Navajo employment preference provision as follows:

> ARTICLE XIX. NAVAJO EMPLOYMENT PREFERENCE
>
> Lessee agrees to employ Navajo Indians when available in all position for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to

utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

2. The 1964 Navajo Coal Lease No. 8580

A Mining Lease executed on February 1, 1964 between the Navajo Tribe and Sentry Royalty Company, Peabody Coal's predecessor in interest, for the lands that were subject of the 1961 Navajo Permit ("Navajo Coal Lease No. 8580"), provides in pertinent part:

ARTICLE VI. TERMINATION OF FEDERAL JURISDICTION

During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. . .

***

ARTICLE VIII. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Advisory Committee of the Navajo Tribal Council, authorize the suspension of mining operations for such time as he considers advisable. . .

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ARTICLE X. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases. . .

***

ARTICLE XI. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Advisory Committee of the Navajo Tribal Council. . .

***

ARTICLE XVI. CANCELLATION AND FORFEITURE

When, in the opinion of the Mining Engineer of the Navajo Tribe and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Navajo Tribe shall have the right . . . to declare this lease null and void. . .

***

ARTICLE XIX. NAVAJO EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other

higher jobs in connection with Lessee's operations under this Lease.

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ARTICLE XXII. OBSERVANCE OF TRIBAL RESOLUTIONS

"Lessee agrees to comply with all lawful resolutions adopted by the Navajo Tribal Council."

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ARTICLE XXVIII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it shall be deemed to be properly given if delivered in person, or sent by registered or certified mail . . . to the persons specified below:

To or upon the Tribe:

Chairman
Navajo Tribal Council
Window Rock, Arizona

and

General Superintendent
Navajo Agency, Bureau of Indian Affairs
Window Rock, Arizona ...

Navajo Coal Lease No. 8580 was approved on August 28, 1964 by John C. Dibbern, assistant area director of the Bureau of Indian Affairs, Department of the Interior.

3. The 1964 Joint Use Permit

A Drilling and Exploration Permit executed on June 1, 1964 between The Hopi Tribe of Arizona and The Navajo Tribe of Indians and Sentry Royalty Company, Peabody Coal's predecessor in interest (the "Joint Use Permit"), contains provisions nearly identical to those in the 1961

Navajo Permit. The Joint Use Permit provides in pertinent part:

> 1. Pursuant to authority contained in a resolution of the Hopi Tribal Council, H-7-64 dated June 1, 1964, and a resolution of the Advisory Committee of the Navajo Tribal Council, ACMY-77-64 dated May 7, 1964, Permittee is hereby granted the exclusive right to drill and explore for coal for a period of two years from and after the date of approval hereof by the Secretary of the Interior. . .
>
> ***
>
> 10. Permittee will employ members of the Hopi and Navajo Tribes when available in all positions for which they are qualified and pay prevailing wages to such Hopi and Navajo employees. Permittee will make a special effort to work members of the Hopi and Navajo Tribes into skilled, technical, and other higher jobs in connection with its operations under this permit.
>
> ***
>
> 12. This permit shall not be assignable without the prior approval of the Hopi Tribal Council, the Advisory Committee of the Navajo Tribal Council, and the Secretary of the Interior.

The Joint Use Permit was approved and signed on October 20, 1964 by John C. Dibbern, area director, Gallup Area Office, Bureau of Indian affairs, Department of the Interior, and on October 23, 1964, by George W. Hadden, area director, Phoenix Area Office, Bureau of Indian Affairs, Department of the Interior.

Exhibit B to the Joint Use Permit, made a part thereof pursuant to paragraph 1 of the Joint Use Permit, and entitled "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company

[Peabody Coal's predecessor in interest] and the Hopi and Navajo Tribes" (the "Joint Use Lease") contains provisions nearly identical to those in Coal Lease No. 8580, except that employment preference is given to both Hopis and Navajos. Before execution of the Joint Use Lease, however, a dispute arose regarding the terms of this Joint Use Lease. As a result, the Hopi Tribe and the Navajo Tribe executed separate mining leases on June 6, 1966.

The resulting Hopi Coal Lease, entitled "United States Department of the Interior Bureau of Indian Affairs Mining Lease between the Hope [sic] Tribe, State of Arizona and Sentry Royalty Company" required Sentry (predecessor in interest to Peabody Coal) to give Hopi Indians preference in hiring, allowed the Hopi Tribe to extend the preference to Navajo Indians, and required Sentry (predecessor in interest to Peabody Coal) to "make a special effort to work Hopi and Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

4. The 1966 Navajo Coal Lease No. 9910

The resulting Navajo Lease ("Navajo Coal Lease No. 9910"), "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company and the Navajo Tribe State of Arizona," contained terms virtually identical to those in Navajo Coal Lease No. 8580, except that it allowed Sentry, predecessor in interest to Peabody Coal, to extend the employment preference provision to members of the Hopi Tribe. It provided in pertinent part as follows:

> ARTICLE IV. ANNUAL RENTAL
>
> Lessee agrees . . . to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Navajo Tribe. . .
>
> ***

ARTICLE VI. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Lessor, authorize the suspension of mining operations for such time as he considers advisable. . .

***

ARTICLE VIII. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases. . .

***

ARTICLE IX. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Lessor. .

***

ARTICLE XI. INSPECTION

The leased premises and producing operation, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts of Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

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ARTICLE XIV. CANCELLATION AND FORFEITURE

When, in the opinion of the Lessor and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Lessors shall have the right . . . to declare this lease null and void. . .

***

ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

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ARTICLE XXVII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it, shall be deemed to be properly given if delivered in person, or sent by registered or certified mail ... to the persons specified below:

Chairman
Navajo Tribal Council
Window Rock, Arizona

Secretary of the Interior (2 copies). . .

Navajo Coal Lease 9910 was approved and signed on July 7, 1966, by Graham Holmes, area director, Bureau of Indian Affairs, Department of the Interior.

5. Drafting, Negotiations, and Amendments

Peabody Coal in-house counsel Edward L. Sullivan Jr. has testified by affidavit that it is his understanding, based on his review of the 1961 Navajo Permit and the 1964 Joint Use Permit and the history of Peabody Coal's leasing rights in Arizona, that the 1961 Navajo Permit and the form of lease attached as Exhibit B thereto and the 1964 Joint Use Permit and the form of lease attached as Exhibit B thereto were drafted by the United States Secretary of Interior or his authorized representative and presented to Sentry with no meaningful opportunity to bargain over the employment preference term.

The 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 contain virtually identical terms as excerpted above, to the terms in the form leases, with the exception that the 1966 Navajo Coal Lease No. 9910 allows Sentry to extend the Navajo hiring preference to the Hopi Tribe as well.

Attorney Sullivan has further testified pursuant to affidavit that the 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 have been amended twice since they were executed, each time with the approval of the Secretary of the Interior, and each time without any changes to the employment preference provision. In 1987, he testified, a new article was added to each lease, stating that all provisions of the original leases would continue in full force and effect, except as expressly modified by the amendments. The most recent amendment was approved on March 29, 1999, by Bruce Babbitt, then Secretary of the Interior, he testified.

Attorney Marvin O. Young, former Peabody Coal general counsel from 1968 to 1985, further testified by affidavit that he is familiar with two other Mining Leases

executed with the Navajo Nation, one by Utah International, and one by P&M, and that each contains a Navajo employment preference clause. He testified by affidavit that "It is my understanding that the United States Secretary of the Interior required these employment preference provisions as a condition of the leases, as part of a standardized practice by the Secretary of the Interior at the time."

5. Navajo Preference in Employment Act

While this lawsuit has been pending, Peabody Coal has been subject to legal action by the Navajo Nation seeking to enforce the Navajo Preference in Employment Act, 15 NNC § 601, *et seq.*

Section 604 of the Navajo Preference in Employment Act states as follows:

> **§ 604. Navajo employment preference**
>
> A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall:
>
> 1. Give preference in employment to Navajos. . .

15 NNC § 604.

B. EEOC'S OBJECTIONS TO THE EVIDENCE

The EEOC has not offered any evidence to controvert the evidence offered by Peabody Coal and outlined above, nor has it suggested that it has any such evidence. The EEOC has not disputed that the documents offered by Peabody Coal, specifically the 1961 Navajo Permit, the 1964 Joint Use Permit, the Hopi Lease, and 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 contain the terms outlined.[2]

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[2] The EEOC states at page 2 of its brief that "to the extent that the two affiants' avowals rely on actual language from the lease

The EEOC, however, has moved to strike certain statements outlined in section A.4., *supra*, by Peabody Coal former and present in-house counsel relating to the Secretary of Interior's direct involvement in drafting and approving the Coal Leases, and whether the Navajo employment preference is typically included in such Coal Leases. These statements, the EEOC argues, should not be admitted with regards to Peabody Coal's argument that the issue in this litigation presents a nonjusticiable political question.

The EEOC originally also moved to strike Mr. Sullivan's sworn statements referring to the contents of the amendments to the Coal Leases, *i.e.*, his testimony that the Coal Lease amendments did not change the Navajo hiring preference. The EEOC, however, has since stipulated that the amendments and related supplements to Navajo Coal Lease 8580 and Navajo Coal Lease 9910 "did not change, or address, the hiring preferences outlined in those leases." *See* Corrected Stipulation Regarding Lease Amendments, dated 7/23/02 (Doc. # 57).

The EEOC apparently retains its original objections to Mr. Sullivan's sworn statements as to his understanding that the Secretary of the Interior drafted the original Permits and form of Leases, and that Sentry was not provided the opportunity to bargain over the employment preference term, arguing he has not shown personal knowledge of the negotiations. The EEOC also moved to strike Attorney Young's statement that it was his understanding that the Navajo employment preference was required by the Secretary of Interior in mining leases, and was typical of such leases, on the ground attorney Young has not established personal knowledge.

Peabody Coal, however, cites to a brief that the EEOC filed with the United States Court of Appeals for the Ninth

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agreements or other documents attached to their affidavits, the Commission has not challenged the avowals."

Circuit, wherein Peabody Coal conceded that the Navajo employment preference provisions are aggressively pushed by the Navajo Nation and are in a number of the Navajo Nation's lease agreements. *See* EEOC's Motion to Intervene in *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, at p. 14, attached as Ex. B to Defendant's Response to Plaintiff's Motion to Strike.

II. PROCEDURAL BACKGROUND

Defendant Peabody Coal has moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment to dismiss this Complaint on the ground that 1) the Navajo Nation is a necessary and indispensable party to this litigation and its joinder is not feasible under Rule 19(b) because the EEOC is not empowered to bring this action against the tribe; or alternatively 2) this case presents a nonjusticiable political question. In the event this Court does not grant Peabody Coal's motion for summary judgment, Defendant Peabody Coal has moved pursuant to Rules 12(b)(6) and Rule 12(f) to dismiss and/or stay and/or strike this Complaint on the grounds that 1) the EEOC failed to conciliate as required by Title VII; 2) the EEOC failed to set forth legal bases warranting the relief it requests; and 3) the EEOC has defined a class in a manner not permitted by Section 706 of the Civil Rights Act of 1964 on which the EEOC relies.

Finally, Delbert Mariano and Thomas Sahu, members of the Hopi Tribe, and the charging parties in the EEOC complaint, have moved pursuant to Rule 24 of the Federal Rules of Civil Procedure to intervene as plaintiffs in this lawsuit.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) must be treated as a motion for summary judgment under Federal Civil Procedure Rule 56 if either party to the motion to dismiss submits materials outside the pleadings in support of or in opposition to the motion that the

Court relies on in its ruling. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

A motion for summary judgment may be granted only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The Court views the evidence in the light most favorable to the nonmoving party, Plaintiff here, and draws any reasonable inferences in the nonmoving party's favor. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171, 134 L. Ed. 2d 209, 116 S. Ct. 1261 (1996).

A case is deemed to have raised a political question not suitable for judicial review if one of the following formulations is inextricable from the case:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

> resolution without expressing lack of the respect due coordinate branches of government or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962) (emphasis added).

III. DISCUSSION

Rule 19 of the Federal Rules of Civil Procedure requires that this Court determine 1) whether an absent party is necessary to the action; and then 2) if the party is necessary but cannot be joined, whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

The EEOC has expressly conceded that the Navajo Nation is a necessary party to this litigation under Rule 19(a) of the Federal Rules of Civil Procedure. *See* Plaintiff's Opposition at page 4, lines 2-3.

The EEOC argues, however, that dismissal is not appropriate because this Court can and should Order that the Navajo Nation be made a party to this litigation. The EEOC specifically asks that this Court "order the Navajo Nation to appear and defend any interests it believes may be affected by this litigation." *See* Plaintiff's Opposition at page 4, lines 24-25. The EEOC further indirectly characterizes this lawsuit as litigation over "the validity of its [the Navajo Nation's] discriminatory lease provision and employment preference provisions ... [and] the interplay between its tribal sovereignty and Title VII." *Id.* at p. 5, lines 18-21. Thus, the initial issue before this Court on Peabody Coal's Motion for Summary Judgment is whether the Navajo Nation can properly be joined as defendant in this lawsuit.

A. The EEOC's Statutory Authority To Sue The Navajo Nation

Peabody Coal does not argue that The Navajo Nation cannot assert sovereign immunity against any lawsuit that might be brought by the EEOC, as representative of the United States.

Instead, Peabody Coal claims that the Court may not join the Navajo Nation because the Commission may not maintain an action "against a government, governmental agency, or political subdivision." *See* 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 2000e-4(g)(6). The first cited statute reads in pertinent part as follows:

> . . . In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

42 U.S.C. § 2000e-5(f)(1) (emphasis added). The second cited statute authorizes the EEOC to intervene in actions brought under 2000e-5 against "a respondent other than a government, governmental agency or political subdivision." *See* 42 U.S.C. 2000e-4(g)(6) (emphasis added).

The EEOC does not dispute that the Navajo Nation is a "government, governmental agency, or political subdivision" under these statutes. The EEOC, however, argues that the plain language of this portion of Title VII applies *only* to a "respondent" who is "a government, governmental agency, or political subdivision." It further argues that the Navajo Nation is not a "respondent" under the statutory definition. The referenced statute provides as follows:

> (n) The term "respondent" means an employer, employment agency, labor organization, joint labor-

> management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program or Federal entity subject to section 2000e-16 of this title.

42 U.S.C. 2000e(n). The EEOC argues that the Navajo Nation was not an employer in this case, and thus cannot be considered a "respondent" for purposes of 42 U.S.C. § 2000e-5(f)(1). Thus, the EEOC concludes, 42 U.S.C. § 2000e-5(f)(1) does not limit its power to sue the Navajo Nation.

Another district court, addressing the similar argument that the EEOC had authority to sue a government so long as it did not directly seek relief from the government, soundly rejected it, reasoning:

> In short, the EEOC argues that Congress intended to preclude the EEOC from suing governmental entities for some purposes but not for others. This position is entirely unsupported by the language of the statute, by case law, and by any reasonable policy justification.

EEOC v. AFT Local # 571, 761 F. Supp. 536, 539 (N.D. Ill. 1991) (holding that EEOC's joinder of a school district, a participant in a collective bargaining agreement, as a necessary party under Rule 19 "was frivolous in view of unambiguous statutory and case law authority which prohibited the EEOC from naming [a governmental entity] as a defendant"). The Court quoted another court's reasoning with approval as well:

> It goes too far to argue that EEOC in suing a private party must be able to join indispensable governmental entities or enforcement of the statute will be frustrated. The Attorney General is, after all, part of the federal government also and if he decides to sue a public body he will necessarily have to make the converse decision to join the indispensable private party. The motion to dismiss the Board is granted.

Id. at 540. The same reasoning applies here to reject the EEOC's contention that the statute does not prohibit it from suing the Navajo Nation, a government, because it is not a "respondent" government. The EEOC argument is too strained to support what the statute clearly was not intended to authorize.

The EEOC concedes, moreover, that Indian tribes, including the Navajo Nation, are specifically exempt as employers from the requirements of Title VII, pursuant to 42 U.S.C. § 2000e(b), which provides in pertinent part as follows:

(b) The term "employer" . . . does not include (1) . . . an Indian tribe . . . 42 U.S.C. § 2000e(b). The EEOC concludes from this section, however, that Congress intended to exempt the Navajo Nation from suit *only* when it was an employer, and *not* when it might instead be considered a "government entity."

The EEOC's interpretation of these two statutes together is mistaken, as contrary to their plain meaning. The Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved. *See* 42 U.S.C. § 2000e-5(f)(1); *see also* 42 U.S.C. § 2000e-5(f)(2); 42 U.S.C. § 2000e-8(c) (the Attorney General is to take the appropriate action "in a case *involving* a government, governmental agency, or a political subdivision.") The EEOC cannot expand its authority to bring suit against an Indian tribe, which is clearly exempt from the provisions of Title VII, and is also a "government" specifically exempted from suit by the EEOC, on such a thin argument. No meaningful distinction exists between "respondent" and "defendant" under the circumstances presented here. The EEOC in effect is seeking to sue the Navajo Nation to force it to defend the Navajo Preference in Employment Act and its contracts with employers working on its lands, when it is prohibited from suing the Navajo Nation to enforce Title VII provisions against the tribe directly. This is contrary to the clear

provisions of Title VII prohibiting the EEOC from suing governments, and specifically exempting the Indian tribes from its provisions. *See EEOC v. AFT Local # 571*, 761 F. Supp. at 539.

The EEOC further argues that it has the authority to sue the Navajo Nation pursuant to 42 U.S.C. § 2000e-5(a), which provides in pertinent part as follows:

> The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

42 U.S.C. § 2000e-5(a). The EEOC argues that the statutory definition of "person" specifically includes "governments, governmental agencies, political subdivisions." *See* 42 U.S.C. § 2000e(a). Therefore, the EEOC concludes, "there simply is no basis for Peabody's claim that the Commission cannot litigate this claim when the Navajo Nation is present." *See Plaintiff's Opposition* at page 7. This argument also fails. The EEOC's authority under this section is limited to enforcement of sections 2000e-2 and 2000e-3, which specifically prohibit an "employer," as defined in 2000e(n), from discrimination on the basis of national origin, or retaliation.

The EEOC's reliance on the suggestion in *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150, 1162 (9th Cir. 2002) (*Dawavendewa II*) that plaintiff might have a viable alternative forum by virtue of a lawsuit instituted by the EEOC, since "tribal sovereign immunity does not apply in suits brought by the EEOC," is misplaced. *See Dawavendewa II*, 276 F.3d at 1162 (quoting *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001)).[3] This issue was not specifically before

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[3] The EEOC mistakenly cites *Karuk* and *Dawavendewa II* for the proposition that the Ninth Circuit "has twice expressly stated than an Indian tribe is a proper party to litigation brought by the Commission." *See* Opposition at p.4, ll. 7-9. In neither of those

the Court or necessary to its holding, and is therefore dicta. *See id.* Moreover, that Court did not address the issue of whether the EEOC had statutory authority to bring a lawsuit against an Indian tribe, the issue here. *See id.*

This Court is not persuaded that Title VII grants the EEOC authority to sue an Indian tribe when it is not the employer, but is instead a party to Coal Leases executed with the employer that direct it to give preference to Navajos. After all, Title VII expressly exempts Indian tribes from its provisions, and expressly prohibits the EEOC from naming as respondent parties "governments," a term the EEOC does not dispute includes Indian tribes. This Court is persuaded that Congress did not intend to authorize the EEOC to name the Indian tribes as defendants in a lawsuit alleging Title VII violations, no matter what their role. This Court is further persuaded that joinder of an Indian tribe under Rule 19 would divest the EEOC of its authority to litigate. *See EEOC v. AFT, Local # 571*, 761 F. Supp. at 539.

Accordingly, this Court concludes that the joinder of the Navajo Nation, a necessary party under Rule 19(a) of the Federal Rules of Civil Procedure, is not feasible.

B. Whether the Navajo Nation is an Indispensable Party

Thus, this Court must decide whether the Navajo Nation is an indispensable party to this lawsuit such that in "equity and good conscience" the suit should be dismissed. *See Confederated Tribes v. Lujan*, 928 F.2d at 1498; Fed. Civ. Pro. Rule 19(b).

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cases did the Ninth Circuit address the issue of whether the EEOC has statutory authority to sue an Indian tribe under Title VII. In *Karuk*, the Ninth Circuit specifically held that the EEOC did not have regulatory jurisdiction over an Indian tribe under the Age Discrimination in Employment Act, even though the ADEA does not expressly exempt Indian tribes from its jurisdiction, as does Title VII. *See Karuk*, 260 F.3d at 1082.

To make this determination, the Court must balance four factors: 1) the prejudice to any party or to the absent party; 2) whether relief can be shaped to lessen prejudice; 3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and 4) whether there exists an alternative forum. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996).

The Ninth Circuit addressed these factors in *Dawavendewa II*, involving a lease between Salt River Project and the Navajo Nation that contains a Navajo Employment Preference provision similar to the one in the Coal Leases at issue here. *See Dawavendewa II*, 276 F.3d at 1161-63.

With regards to the first factor, prejudice to any party or to the absent party, the Ninth Circuit found in that case that any decision in the absence of the Navajo Nation would prejudice the Navajo Nation's economic interests in the lease, "namely its ability to provide employment and income for the reservation." *See id.* at 1162. The court also found that a decision would "prejudice the Nation's sovereign interests in negotiating contractual obligations and governing the reservation." *See id.* The court also found that the absence of the Nation would prejudice the defendant by preventing the resolution of its lease obligations. *See id.* The same prejudice would occur here with respect to the Navajo Nation and Peabody Coal.

With regards to the second factor, whether relief can be shaped in the Nation's absence to lessen prejudice, the court found that any decision mollifying the plaintiff would prejudice the Nation in its contract with the defendant and its governance of the tribe. *See id.* The same is true here: any relief for the EEOC would come at the expense of the economic and sovereign interests of the Nation.

With regards to whether an adequate remedy could be fashioned absent the Nation, the court found that no partial relief would be adequate, that injunctive relief would

necessarily result in the above-described prejudice to the defendant and the Nation, and an award of damages would not resolve defendant's potential liability to other plaintiffs. *See id.* The same holds true here as well. This factor also warrants dismissal.

The only distinction between the Ninth Circuit's analysis in *Dawavendewa II* and this case with respect to the issue of whether the Navajo Nation is an indispensable party is with regards to the fourth factor, whether there exists an alternative forum. In *Dawavendewa II*, the Ninth Circuit suggested in dicta that the plaintiff "may have a viable alternative forum in which to seek redress" by joining in a lawsuit filed by the EEOC (on the premise the Nation could not assert sovereign immunity against the EEOC), or by suing in tribal court, obtaining an adverse decision, and then bringing suit against the officials in federal court. *See id.* at 1162-63 and n.12. "Recognizing the resources and aggravation consumed in relitigating," however, the court determined that this factor "remains in equipose." *See id.* at 1163. The court noted, moreover, that the absence of any alternative forum to air the grievance was not an impediment to dismissal on grounds an absent party was indispensable. *See id.* at 1162. Here, there may be no alternative judicial forum. This Court, however, finds that this is not an impediment to dismissal.

On balancing these four factors, this Court finds, as did the Ninth Circuit in *Dawavendewa II*, that the Nation is an indispensable party, and that "in equity and good conscience" the lawsuit cannot proceed in its absence. *See id.* at 1163.

Dismissal of this action is therefore proper because the Navajo Nation, a necessary and indispensable party to this litigation, cannot be made a party to this litigation by the EEOC under the specific provisions of Title VII. *See* 42 U.S.C. § 2000e-5(f)(1)(prohibiting the EEOC from filing action against a "government"); 42 U.S.C. § 2000e(b) (exempting Indian tribes from provisions of Title VII); *Dawavendewa II*, 276 F.3d at 1162 (holding that the Navajo

Nation was a necessary and indispensable party to employment discrimination lawsuit involving its leases, and that the lawsuit could not go forward in its absence).

C. Whether this Case Presents a Nonjusticiable Political Question

Even if arguably the EEOC did have statutory authority to sue the Navajo Nation under the circumstances presented here, and its joinder did not divest the EEOC of its authority to litigate, this Court also finds that this case presents a nonjusticiable political question, and it must be dismissed on this alternative ground as well.

The political question doctrine is a "tool for the maintenance of governmental order," and "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 214, 210, 82 S. Ct. 691, 709, 706, 7 L. Ed. 2d 663 (1962). In deciding whether a case raises a political question that is not suitable for judicial review, the Court fashioned the following test:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S. Ct. at 710 (emphasis added). If any one of these "formulations is inextricable from the case at bar," the

case should be dismissed on the ground it presents a nonjusticiable political question. *See id.*; *see also Powell v. McCormack*, 395 U.S. 486, 518-19, 89 S. Ct. 1944, 1962, 23 L. Ed. 2d 491 (1969) (noting that a nonjusticiable political question must involve at least one of these formulations).[4] It is necessary to conduct a "discriminating inquiry into the facts and posture of the particular case" to ascertain whether it presents a nonjusticiable political question. *Baker v. Carr*, 269 U.S. at 217, 82 S. Ct. at 710.

1. The Issues Presented

The EEOC seeks in this action in effect to enjoin enforcement of the Navajo Employment Preference provisions agreed to by the Navajo Nation and Peabody Coal and approved by the Department of the Interior through a representative of the Bureau of Indian Affairs in 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910. The EEOC has specifically requested in its Complaint that this Court in part:

> A. Grant a permanent injunction enjoining Peabody, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin.

Complaint, Prayer for Relief at A. In fact, the EEOC has indicated that it intends not only to seek to void or rework the Navajo Nation's Coal Leases, but also to seek to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act. *See* Plaintiff's Opposition, at p. 8, lines 4-6, p. 15, n.7. The Navajo Nation Preference in Employment Act directs that "all employers doing business within the territorial jurisdiction ... of the Navajo Nation, or engaged in

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[4] As evidenced by these portions of the Courts' opinions, the EEOC is mistaken in its assertion that the doctrine is not implicated absent a "textually demonstrable constitutional commitment." *See id.*

any contract with the Navajo Nation, shall . . . "give preference in employment to Navajos. . ." 15 NNC § 604. The EEOC suggests, however, that the Navajo Nation is free *only* to require that private company such as Peabody Coal operating on their reservations "adopt hiring preferences for all Native Americans living on or near the reservations," but *not* to adopt hiring preferences applicable to Navajos only. *See id.* at p. 15 n.7. In Plaintiff's Motion to Strike Portions of The Statement of Facts and Affidavits Submitted by Defendant. in fact, the EEOC describes "the central issue in this case" as "whether the Navajo Nation can discriminate against non-Navajo Native Americans." *See* Plaintiff's Motion to Strike, p.2, ll. 19-20. The EEOC suggests, moreover:

> There is nothing in Title VII which says that the Navajo Nations, as a sovereign subordinate to the superior sovereignty of the United States, cannot be enjoined from engaging in actions clearly prohibited by Title VII.

See Plaintiff's Opposition, at page 8, lines 4-6.

This EEOC position on its face appears to be in direct contradiction to the position taken by the United States Department of the Interior through its approval and signature of its authorized representatives on the Coal Leases containing the Navajo Employment Preference provision at issue.

The EEOC concedes in this action that the documents offered by Peabody Coal, specifically the 1961 Navajo Permit, the 1964 Joint Use Permit, the Hopi Lease, and 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910, contain the terms outlined. It is therefore undisputed that the permits and leases at issue was approved and signed by a representative of the United States Department of the Interior. It is undisputed that these documents are replete with provisions that require the oversight of the Secretary of the Interior. It is undisputed that

the Secretary of the Interior has specific authority to declare either of these leases "null and void" when in the opinion of the Secretary of the Interior and the Mining Engineer of the Navajo Tribe, "there has been a violation of any of the terms and conditions of the lease." Moreover, it is undisputed that Navajo Coal Lease No. 9910 is specifically entitled: "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company [predecessor in interest to Peabody Coal] and the Navajo Tribe State of Arizona. "Finally, the EEOC has stipulated that the amendments to these Coal Leases "did not change, or address, the hiring preferences outlined in those leases." Thus, it is undisputed that as recently as 1999, the Secretary of the Interior through its authorized representative, approved or signed off on the Navajo Employment Preference provision.

2. The EEOC's Objections

The EEOC in fact has offered no evidence at all to dispute the evidence offered by Peabody Coal. Nor has the EEOC suggested that the testimony offered by Peabody Coal attorneys is false or that these attorneys are somehow wrong in their sworn testimony that it is their understanding that the Secretary of the Interior drafted the initial documents, and routinely requires this type of provision in such leasing agreements.

Instead, the EEOC moves to strike these sworn statements, on the grounds that the attorneys making the statements do not have personal knowledge necessary to make these statements. This Court declines to do so. Attorney Sullivan, senior counsel for Peabody Holding Company, Inc., who serves as primary in-house counsel for Peabody Coal, testified that in that capacity he had "become familiar with numerous documents reflecting the relationship between Sentry Royalty Company ("Sentry") PWCC's [Peabody Coal's] predecessor in interest, and both the Navajo Tribe and the Hopi Tribe." He testified that those documents included the Navajo Coal Lease No. 8580 and Navajo Coal Lease

9910, and the amendments thereto. By virtue of his experience and his review of these documents in his capacity as in-house counsel for Peabody Coal, Attorney Sullivan had the personal knowledge and competency required under the governing law to testify as to his understanding as to the documents' origin, development and meaning. *See, e.g., Barthelemy v. Air Lines Pilots Assoc.*, 897 F.2d 999, 1017 (9th Cir. 1990) (corporate officers' "personal knowledge and competence to testify are reasonably inferred from their positions"); *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 702 (5th Cir. 1991) (corporation's senior attorney could testify to matters in affidavit that the learned through the corporation's business records, even though he did not have "personal knowledge" as to all matters). Former Peabody Coal general counsel Attorney Young testified by affidavit that in his capacity as general counsel and as part of his job duties, he "became familiar with lease agreements that Peabody predecessor, Sentry Royalty Company, entered into with the Navajo Nation for coal mining operations . . . [and] with the terms of coal mining leases that other entities had with the Navajo Nation." Based on his experience and job duties, attorney Young had the personal knowledge and competency required under the governing law to testify as to his understanding that the Secretary of the Interior required the Navajo Employment Preference as a condition of the leases. *See id.*

Even if the Peabody Coal's counsels' statements to which the EEOC objects were stricken, however, this Court finds that the actual Permits and Coal Leases in the undisputed record before this Court provide ample support for the proposition that the Secretary of the Interior, through the Bureau of Indian Affairs, has to this date a policy of requiring or at least approving Navajo Employment Preference provisions in Coal Leases executed by private companies with the Navajo Nation.

The EEOC's position in this lawsuit therefore is in direct contradiction to the position of the Secretary of the Interior.

Any decision by this Court would of necessity require it to make an initial policy choice between the EEOC's enforcement of Title VII and its underlying policies against discrimination and the Secretary of the Interior's policies and practices with regards to Indian tribes. This is the type of case presenting "the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion" that is not appropriate for judicial resolution. *See Baker v. Carr*, 369 U.S. at 217, 82 S. Ct. at 710. Moreover, any decision by this Court would require it to show a lack of respect for one of the two governmental entities: either the EEOC or the Department of the Interior. For this reason also, this case presents a nonjusticiable political question. *See id.* (a political question is presented when it is clear "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government"). Finally, any decision by this Court is likely to lead to the potential "of embarrassment from multifarious pronouncements by various departments on one question." *See id.* The EEOC and the Department of the Interior, through the Bureau of Indian Affairs, have different interests and opposing views on the issue of the Navajo Employment Preference provision. For all of these reasons, this Court finds that this case presents a nonjusticiable political issue, and it must be dismissed on this alternative ground also. *See id.*

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (Doc. # 38) is **GRANTED;**

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike Portions of the Statement of Facts and Affidavits Submitted by Defendant in Support of its Motion for Summary Judgment (Doc. # 43) is **DENIED;**

IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's Reply in Support of Plaintiff's Motion to Strike as Untimely (Doc. # 49) is **DENIED;**

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss and/or Stay and/or Motion to Strike (Doc. # 24) is **VACATED AS MOOT;**

IT IS FURTHER ORDERED that Delbert Mariano and Thomas Sahu's Motion to Intervene as Plaintiffs (Doc. # 23) is **VACATED AS MOOT.**

IT IS FURTHER ORDERED That Clerk of the Court shall **ENTER JUDGMENT ACCORDINGLY.**

DATED this 24th day of September, 2002.

Mary H. Murguia

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-17305
D.C. No. CV-01-01050 MHM
District of AZ, Phoenix

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff - Appellant,

vs.

PEABODY COAL COMPANY,
Defendant - Appellee.

DELBERT MARIANO; THOMAS SAHU,
Applicants in intervention.

ORDER

Before: HUG, ALARCON, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc; and Judges Hug and Alarcon so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed April 22, 2005, are DENIED.

Supreme Court, U.S.
FILED
DEC 19 2005
OFFICE OF THE CLERK

No. 05-353

In the Supreme Court of the United States

PEABODY WESTERN COAL COMPANY AND
PEABODY COAL COMPANY, LLC, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether joinder of the Navajo Nation under Federal Rule of Civil Procedure 19(a) was improper.

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In the Supreme Court of the United States

No. 05-353

PEABODY WESTERN COAL COMPANY AND
PEABODY COAL COMPANY, LLC, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 400 F.3d 774. The opinion of the district court (Pet. App. 19a-48a) is reported at 214 F.R.D. 549.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2005. A petition for rehearing was denied on May 18, 2005 (Pet. App. 49a). On August 3, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 15, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Peabody Western Coal Company mines coal at the Black Mesa Complex on the Navajo and Hopi reservations in northeastern Arizona. Pet. App. 2a. Those mining operations are authorized by several leases between the Navajo and Hopi Tribes and petitioner's predecessor-in-interest. *Ibid.* The leases with the Navajo Nation state that petitioner "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [petitioner], they are qualified." *Ibid.* Those leases have been approved by the United States Department of the Interior (DOI) pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a, 396e. See Pet. App. 3a; *United States* v. *Navajo Nation*, 537 U.S. 488, 493-494 (2003). The Navajo Nation has also enacted the Navajo Preference in Employment Act, 15 N.N.C. 601 *et seq.* See Pet. App. 30a. Section 604 of that Act requires "[a]ll employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation" to "[g]ive preference in employment to Navajos." *Ibid.*

2. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits any "employer" from discriminating in employment on the basis of, *inter alia*, "national origin." 42 U.S.C. 2000e-2(a)(1). Title VII's definition of the term "employer" specifically excludes "an Indian tribe." 42 U.S.C. 2000e(b). Title VII separately provides that "[n]othing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42

U.S.C. 2000e-2(i). Respondent Equal Employment Opportunity Commission (EEOC or Commission) construes that exception to permit an employer operating on or near a reservation to give preference to Indians over non-Indians, but not to discriminate among the members of different Indian Tribes. See *EEOC: Policy Statement on Indian Preference Under Title VII*, 8 Fair Empl. Prac. Manual (BNA) 405:6647, 405:6653 (May 16, 1988).

Title VII authorizes private suits and also provides for enforcement by both the EEOC and the Attorney General. 42 U.S.C. 2000e-5(f). With respect to charges filed with the EEOC against public entities, Title VII states that, "[i]n the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." 42 U.S.C. 2000e-5(f)(1).

3. Federal Rule of Civil Procedure 19(a) provides as follows:

> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a

> practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Fed. R. Civ. P. 19(a). Federal Rule of Civil Procedure 19(b) states in pertinent part that, "[i]f a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b).

4. In June 2001, the EEOC filed suit in federal district court, alleging that petitioner had violated Title VII by refusing to hire qualified applicants who were members of non-Navajo Indian Tribes for positions at the mines operated by petitioners on reservation land. C.A. E.R. 1-5. The EEOC's complaint alleged that three such individuals had "filed charges of discrimination with the Commission alleging that [petitioner] had violated Title VII by refusing to hire them because they were Native Americans who were not members of the Navajo Nation." *Id.* at 2. The EEOC's complaint did not name the

Navajo Nation as a defendant in the action. See *id.* at 1-5.

Petitioner moved for dismissal of the EEOC's complaint and for summary judgment. Pet. App. 5a. Petitioner pointed to the Nation's absence and contended, *inter alia*, that Federal Rule of Civil Procedure 19 required dismissal of the suit because the Navajo Nation was a "necessary and indispensable party" whose joinder would not be feasible because the EEOC is not authorized to file suit against a Tribe. *Id.* at 5a, 32a. In response to petitioner's motion to dismiss the action, the EEOC moved to join the Nation as a defendant pursuant to Rule 19. Pet. 6.

The district court granted petitioner's motion and ordered that the case be dismissed. Pet. App. 19a-48a. The court noted the EEOC's concession that the Navajo Nation was a "necessary party" to the litigation—*i.e.*, that the Nation fell within one or both of the categories of persons described in Federal Rule of Civil Procedure 19(a)(1)-(2) who should be joined if joinder is feasible. See Pet. App. 34a. That concession was based on the Ninth Circuit's then-recent decision in *Dawavendewa* v. *Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150, cert. denied, 537 U.S. 820 (2002) (*Dawavendewa II*). See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment Pursuant to FRCP Rule 56, at 3-4 (Mar. 4, 2002). In *Dawavendewa II*, the court of appeals held, in a suit alleging a similar violation of Title VII brought by a *private plaintiff* (not the EEOC), that the Navajo Nation was a person to be joined if feasible under Federal Rule of Civil Procedure 19(a)(1), (a)(2)(i), and (a)(2)(ii), see 276 F.3d at 1155-1159; that the Nation's sovereign immunity rendered its joinder infeasible, see *id.* at 1159-

1161; and that the Nation was an "indispensable" party such that the private plaintiff's suit could not go forward in the Nation's absence, see *id.* at 1161-1163. The court specifically observed, however, that "tribal sovereign immunity does not apply in suits brought by the EEOC" because the Commission is an agency of the federal government. *Id.* at 1163.

The district court in the instant case held that joinder of the Nation was not feasible because (1) the EEOC lacks statutory authority to sue a governmental entity, and (2) an Indian Tribe is not an "employer" within the meaning of Title VII and therefore is not subject to suit under that statute. Pet. App. 35a-39a. The district court further held that the suit could not go forward in the Navajo Nation's absence because the Nation was an "indispensable" party within the meaning of Federal Rule of Civil Procedure 19(b). Pet. App. 39a-41a. The court found that the Nation's absence from the suit "would prejudice [petitioner] by preventing the resolution of its lease obligations." *Id.* at 40a. The court also stated that "any relief for the EEOC would come at the expense of the economic and sovereign interests of the Nation." *Ibid.* The district court therefore dismissed the Commission's lawsuit. *Id.* at 41a.

5. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-18a.

The court of appeals held that the Navajo Nation's connection to the action was such that the Nation should be joined in the suit if joinder was feasible. Pet. App. 9a-10a. The court stated:

> If the EEOC is victorious in its suit against [petitioner], monetary damages for the charging parties can be awarded without the Nation's participation. But declaratory and injunctive relief

> could be incomplete unless the Nation is bound by res judicata. The judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts. But it will preclude the Nation from bringing a collateral challenge to the judgment. If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could possibly initiate further action to enforce the employment preference against [petitioner], even though that preference would have been held illegal in this litigation. [Petitioner] would then be, like the defendant in *Dawavendewa II*, 276 F.3d at 1156, "between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it."

Id. at 9a.

The court of appeals further held that it was feasible to join the Navajo Nation pursuant to Rule 19(a). Pet. App. 10a-15a. The court explained that the Nation's sovereign immunity would not prevent the district court from exercising jurisdiction because that immunity does not apply in a suit brought by a federal agency such as the EEOC. *Id.* at 10a. The court also rejected petitioner's contention (see *id.* at 10a-11a) that the Nation could not be joined because Indian Tribes are specifically exempted from Title VII's definition of "employer" and are not subject to enforcement actions by the EEOC. The court explained that "a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id.* at 11a; see *id.* at 11a-12a (discussing cases).

The court of appeals acknowledged case law from other circuits suggesting, in other circumstances, that a party may not be joined as a defendant under Federal Rule of Civil Procedure 19(a) unless the plaintiff has a cause of action against it. Pet. App. 12a (citing *Vieux Carre Prop. Owners, Inc.* v. *Brown*, 875 F.2d 453, 457 (5th Cir. 1989), cert. denied, 493 U.S. 1020 (1990), and *Davenport* v. *International Bhd. of Teamsters*, 166 F.3d 356, 366 (D.C. Cir. 1999)). The court explained, however, that "the actual holdings of *Vieux Carre* and *Davenport* (as distinct from their abstract statement of the rule) can be reconciled with" the court of appeals' interpretation of Rule 19. *Ibid.* In both *Vieux Carre* and *Davenport*, "the issue was whether the court could join under Rule 19 and then *impose an injunction* directly on a party against whom the plaintiff could not state a cause of action." *Id.* at 12a-13a (emphasis added). In the instant case, by contrast, the EEOC "is not seeking any affirmative relief directly from" the Navajo Nation. *Id.* at 13a. Rather, the Commission seeks to join the Nation "for the sole purpose of effecting complete relief between the parties by ensuring that both [petitioner] and the Nation are bound to any judgment upholding or striking down the challenged lease provision." *Id.* at 14a (citation and internal quotation marks omitted).[1]

The court of appeals emphasized that it did "not decide, even implicitly, the merits of the EEOC's Title VII suit against [petitioner]," and stressed that the merits "determination is for the district court on remand." Pet.

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[1] Because the court of appeals concluded that joinder of the Navajo Nation was "feasible" within the meaning of Rule 19(a), it did not address the question whether the Nation was an "indispensable" party within the meaning of Rule 19(b). That question is therefore not presented by the decision below.

App. 15a; see *id.* at 18a ("We do not decide the merits of the EEOC's Title VII claims against [petitioner] today."). Accordingly, the court remanded the case for further proceedings. *Ibid.*

ARGUMENT

The EEOC brought this action against only petitioner and did not request joinder of the Navajo Nation until petitioner moved for dismissal of the case in the absence of the Nation. The court of appeals correctly held that joinder of the Nation in the unique circumstances of this case was not precluded by the fact that the EEOC would have been unable to sue the Nation directly under Title VII. The court of appeals' resolution of that narrow question is consistent with the text and purposes of Federal Rule of Civil Procedure 19(a), with this Court's decisions construing the Rule, and with the decisions of other circuits. Further review is not warranted.

1. Federal Rule of Civil Procedure 19(a) identifies particular categories of persons who should be joined in a pending lawsuit if joinder is "feasible." In particular, the Rule states that joinder, when "feasible," is appropriate

> if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple,

> or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Although it contends that the Navajo Nation was improperly joined in this case, petitioner does not challenge the court of appeals' determination (see Pet. App. 9a-10a) that the Nation falls within one or both of the two categories of persons described in Federal Rule of Civil Procedure 19(a)(1)-(2). Indeed, the EEOC sought joinder of the Nation in this case only after petitioner sought dismissal of the suit on the ground that the Nation was a "necessary and indispensable party." See p. 5, *supra*. Petitioner's practical interests would not be served, moreover, if the court of appeals' joinder determination were reversed on the ground that the Nation falls outside the categories defined by Rule 19(a)(1)-(2).[2] Petitioner's evident objective in challenging joinder is not to litigate this suit without the participation of the Nation, but—as its initial motion under Rule 19(b) makes clear—to obtain dismissal of the EEOC's claims against it on the ground that the Nation is an "indispensable" party whose joinder is "not Feasible." See Fed. R. Civ. P. 19(b). Because Rule 19(b) authorizes dismissal only when "a person *as described in subdivision (a)(1)-(2)* [of Rule 19] cannot be made a party," *ibid.* (emphasis added), an essential premise of petitioner's Rule 19(b) motion was that the Navajo Nation is "a person described in subdivision (a)(1)-(2)." Accord-

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[2] So long as the EEOC's claims against petitioner remain pending, joinder of the Nation cannot plausibly be considered prejudicial to petitioner's own interests. To the contrary, if the suit is allowed to go forward, joinder of the Nation will give petitioner an opportunity to ensure that its interests are protected and that it is not ultimately subjected to inconsistent legal obligations. See Pet. App. 9a.

ingly, the narrow question presented by the petition is whether, *assuming* that the Navajo Nation has a sufficient legal and practical connection to this case to bring the Nation within one or both of the categories defined by Federal Rule of Civil Procedure 19(a)(1)-(2), joinder is nevertheless precluded because the EEOC lacks an independent cause of action against the Nation under Title VII.

2. Petitioner's contention that joinder of the Navajo Nation is precluded in these unique circumstances has no textual basis in the language of Rule 19(a). The Rule states that a person encompassed by Rule 19(a)(1)-(2) "shall be joined as a party" if (i) the person is subject to service of process, and (ii) joinder will not deprive the court of subject-matter jurisdiction. See Fed. R. Civ. P. 19 Advisory Committee notes (1966) (28 U.S.C. App. at 697) ("If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party."). Petitioner does not argue that the Navajo Nation is insusceptible to service of process under Rule 19 in this case, nor does it contend that joinder of the Nation would deprive the district court of subject-matter jurisdiction. Nothing in the text of Rule 19(a) imposes the additional requirement, proposed by petitioner, that the EEOC have an independent cause of action against the Nation.

Petitioner's reading of Federal Rule of Civil Procedure 19(a), moreover, is inconsistent with this Court's decision in *Martin* v. *Wilks*, 490 U.S. 755 (1989). The plaintiffs in *Martin*, a group of white firefighters, sued the City of Birmingham under Title VII, alleging that they were unlawfully being denied promotions in favor

of less qualified African-American firefighters. *Id.* at 760. The City contended that its race-conscious employment decisions were required by consent decrees entered in a prior suit brought by other plaintiffs, and that the white firefighters' suit constituted an "impermissible collateral attack[] on the consent decrees." *Ibid.*

In holding that the plaintiffs' claims could go forward, this Court explained that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." 490 U.S. at 762. The Court rejected the contention that the white firefighters could be bound by the prior judgment because they had failed to intervene in a timely fashion in the lawsuit that had produced the consent decrees. *Id.* at 762-763. Rather, noting that Federal Rule of Civil Procedure 19(a) "provides for mandatory joinder in circumstances where a judgment rendered in the absence of a person may 'leave . . . persons already parties subject to a substantial risk of incurring . . . inconsistent obligations,'" 490 U.S. at 764, this Court concluded that "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree," *id.* at 765. The Court explained that

> [t]he parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in [by Rule 19 joinder] additional parties where such a step is indicated, rather than placing on potential

> additional parties a duty to intervene when they acquire knowledge of the lawsuit.

Ibid.

The clear thrust of the decision in *Martin* is that the parties to the original lawsuit that had produced the consent decrees could have ensured that the white firefighters were bound by the judgment in that suit by joining those individuals as parties pursuant to Federal Rule of Civil Procedure 19(a). The Court did not suggest, however, and the facts of the case give no reason to suppose, that any party to the original lawsuit would have had an independent legal claim against the white firefighters. The Court's decision in *Martin* therefore strongly indicates that the existence of a cause of action against the joined party is not a prerequisite to joinder under Rule 19(a).[3] Cf. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977) (citing Rule 19(a) and holding that a union would remain in ongoing litigation as a defendant, notwithstanding the absence of any legitimate ground for holding the

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[3] Petitioner speculates (Pet. 28) that the plaintiffs to the original lawsuit at issue in *Martin* could have filed a declaratory judgment action against the white firefighters, and that the Court's discussion of Federal Rule of Civil Procedure 19 in that case is therefore consistent with petitioner's view that joinder under the Rule requires an independent cause of action against the person to be joined. A hypothetical anticipatory suit against the white firefighters, however, based on the *possibility* that those firefighters would ultimately object to entry of consent decrees providing for race-conscious employment practices, would not obviously present the "actual controversy" that the Declaratory Judgment Act requires. 28 U.S.C. 2201(a). In any event, while it made clear that joinder was an available option, the Court in *Martin* did not discuss the Declaratory Judgment Act or suggest that joinder of the white firefighters in the original lawsuit would have depended on the availability of a cause of action for declaratory relief.

union liable under Title VII, "so that full relief may be awarded the victims of the employer's * * * discrimination").

3. Contrary to petitioner's contention (Pet. 9-14), the ruling of the court of appeals in this case does not conflict with the decisions of the Fifth and District of Columbia Circuits in *Vieux Carre* and *Davenport*. Rather, this case differs from *Vieux Carre* and *Davenport* in three important (and related) respects. First, the plaintiffs in *Vieux Carre* and *Davenport* named particular entities as defendants in their original complaints, notwithstanding the plaintiffs' lack of any cause of action against those entities. The EEOC, by contrast, moved to join the Navajo Nation in this case only *after* petitioner sought dismissal of the suit on the ground that the Nation was a "necessary and indispensable party." See p. 5, *supra*. Second, while the plaintiffs in *Vieux Carre* and *Davenport* requested the entry of injunctions against the putative defendants, the EEOC "seek[s] no affirmative relief against the Navajo Nation." Pet. App. 13a. Third, in neither *Vieux Carre* nor *Davenport* did the court of appeals order the disposition that petitioner ultimately seeks—*i.e.*, dismissal of claims against an otherwise appropriate defendant pursuant to Federal Rule of Civil Procedure 19(b) on the ground that an "indispensable" party cannot be joined. See p. 10, *supra*. Those distinctions refute petitioner's claim of a "square circuit conflict" (Pet. 9 (heading)) on the question presented here.

a. Because of the different circumstances presented by *Vieux Carre* and *Davenport*, the decisions in those cases do not squarely address the issue presented here. The plaintiff in *Vieux Carre* was an association of property owners who sought to stop construction of an

aquarium and riverfront park in the French Quarter of New Orleans. 875 F.2d at 454-455. The association sued the United States Army Corps of Engineers (Corps) for declaratory relief, alleging that the Corps had violated the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. 403, and the National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, when it failed to require the developers to obtain a permit for those two projects and failed to submit the proposed projects to the NHPA review process. See 875 F.2d at 455. The plaintiff also sought injunctive relief against the developers and the local governmental entities responsible for authorizing the projects. *Ibid.*

With respect to the claims against the non-federal defendants, the Fifth Circuit "affirm[ed] the district court's dismissal of the [association's] requested injunction, finding that neither the [Administrative Procedure Act] nor the NHPA give a private plaintiff a right of action against any of the defendants other than the Corps." *Vieux Carre*, 875 F.2d at 456. As one basis for its holding that such injunctive relief was unavailable, the court stated that "it is implicit in Rule 19(a) itself that before a party will be joined * * * as a defendant the plaintiff must have a cause of action against it." *Id.* at 457. The Fifth Circuit in *Vieux Carre* had no occasion, however, to decide whether the existence of a cause of action is a prerequisite to joinder if a plaintiff does not seek injunctive or other affirmative relief against an entity sought to be joined.

b. *Davenport*, like *Vieux Carre*, involved the question whether the plaintiffs could invoke Federal Rule of Civil Procedure 19 as a basis for enjoining a defendant against whom no cause of action had been asserted. After a union president and an employer, Northwest Air-

lines, entered into an interim agreement temporarily modifying employees' flight and duty hours, several union members sued their local and national unions for breach of the unions' duties of fair representation under federal labor laws. 166 F.3d at 358-360. The complaint also named Northwest as a defendant and sought to enjoin Northwest from implementing the challenged agreement, but without stating any cause of action against Northwest in the complaint. *Id.* at 360. The court of appeals rejected the plaintiffs' contention that Rule 19 could serve as a basis for enjoining Northwest, stating: "It is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." *Id.* at 366.

c. In both *Vieux Carre* and *Davenport*, the courts of appeals held only that the plaintiffs could not obtain relief against parties as to whom the plaintiffs had no cause of action. Neither court conducted the inquiry mandated by Federal Rule of Civil Procedure 19(b) for cases in which "a person as described in subdivision (a)(1)-(2) [of Rule 19] cannot be made a party," and neither court held that claims against *other* defendants should be dismissed based on the infeasibility of joining an "indispensable" party. Petitioner, by contrast, has argued throughout this litigation that (i) the Navajo Nation is a person described in Rule 19(a)(1)-(2) despite the EEOC's lack of any cause of action against it, but (ii) the EEOC's lack of a cause of action against the Nation renders joinder not "feasible" within the meaning of Rule 19(a). Neither *Vieux Carre* nor *Davenport* provides any support for those contentions.

d. In an attempt to bring this case closer to *Vieux Carre* and *Davenport*, petitioner contends (Pet. 15) that

a judgment running against the Navajo Nation is the practical and legal equivalent of an injunction. That argument is incorrect.

An injunction is a "court order commanding or preventing an action," *Black's Law Dictionary* 800 (8th ed. 2004), and a party to such a court order may be subject to judicial sanctions for failure to comply. See *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 443 (1986) (judicial sanctions in civil contempt proceedings may be employed to coerce a defendant into compliance with a court's order or to compensate a complainant for losses sustained). Notwithstanding the joinder of the Navajo Nation to this lawsuit, however, the judgment ultimately entered in the case will impose no duty on the Nation to undertake or refrain from undertaking any particular act, and it will not subject the Nation to potential sanctions for contempt. Rather, if the EEOC prevails on the merits of its Title VII claims—an issue that remains for remand—the only consequence of the Nation's joinder pursuant to Rule 19(a) will be to require courts to give the judgment appropriate preclusive effect if the legality of the tribal preference becomes a subject of contention in a future dispute to which the Nation is a party. See, *e.g.*, *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 125 S. Ct. 2491, 2500 n.16 (2005) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues * * * raised in that action."); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980).[4] To be

[4] Petitioner's reliance (Pet. 26-27) on 28 U.S.C. 2072(b) is misplaced. Section 2072(b) provides that the rules of practice and procedure promulgated by this Court "shall not abridge, enlarge or modify any substantive right." In *Martin*, this Court explained that "[j]oinder as a party * * * is the method by which potential parties are subjected to

sure, a judgment in the EEOC's favor would likely have a significant impact on the Navajo Nation's ability to obtain employment preferences for tribal members, but that effect is neither the practical nor the legal equivalent of an injunction against the Nation itself enforceable through the power of contempt.

4. Petitioner contends (Pet. 17-29) that joinder of the Navajo Nation in this case in response to petitioner's motion to dismiss is precluded by 42 U.S.C. 2000e-5(f)(1), which provides that enforcement of Title VII against governmental units is entrusted to the Attorney General rather than to the EEOC. That argument is incorrect.

a. Petitioner contends (Pet. 17-18) that "the plain language of Title VII prohibits the EEOC from seeking to resolve Title VII disputes with Indian tribes in court." The text of 42 U.S.C. 2000e-5(f)(1), however, is in fact much more limited in scope. It provides:

> If within thirty days after a charge is filed with the Commission * * * , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or politi-

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the jurisdiction of the court and bound by a judgment or decree." 490 U.S. at 765. The Court evidently did not believe that use of Rule 19(a) to achieve those objectives would "abridge, enlarge or modify any substantive right." Accordingly, because joinder of the Navajo Nation is not sought as a predicate for awarding any affirmative legal or equitable relief against the Nation, application of Rule 19(a) in these circumstances is not barred by Section 2072(b).

> cal subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

42 U.S.C. 2000e-5(f)(1).

Section 2000e-5(f)(1) does not address the situation presented here, which involves joinder of the Navajo Nation in an enforcement action brought by the EEOC against only *a private employer*. Rather, Section 2000e-5(f)(1) is by its terms addressed to the situation where a government entity is itself charged before the EEOC with employment discrimination in violation of Title VII. The word "respondent" in Section 2000e-5(f)(1) clearly refers to the entity that is the subject of an EEOC charge alleging a violation of Title VII. See 42 U.S.C. 2000e-5(b) ("Whenever a charge is filed * * * alleging that an employer * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge * * * on such employer * * * (hereinafter referred to as the 'respondent')."). In filing charges of discrimination with the Commission, the private complainants alleged that *petitioner*, not the Nation, had violated Title VII. See C.A. E.R. 2; p. 4, *supra*. Similarly, the EEOC has not alleged in this case that the Nation itself has violated Title VII. For that reason, in the circumstances here, neither the underlying enforcement action against petitioner, nor the joinder of the Navajo Nation as a party to that action, triggers Section 2000e-5(f)(1).

b. Petitioner is also wrong in suggesting (*e.g.*, Pet. 20) that permitting joinder of a Tribe in this setting

would somehow subvert the congressional policy choice reflected in Section 2000e-5(f)(1)'s allocation of authority between the EEOC and the Attorney General. Joinder of the Navajo Nation as a party to the instant case does not expose the Nation to the remedies authorized by Title VII, nor does it rest on any allegation that the Nation itself has violated the statute. Rather, joinder of the Nation is ancillary to the EEOC's pursuit of Title VII remedies against a private employer—an enforcement action that the Commission has undoubted authority to undertake—and the EEOC did not seek joinder of the Nation until after petitioner had moved to dismiss this case because of the Nation's absence.[5]

c. Petitioner contends (Pet. 3) that "suits by the federal government against Indian tribes under Title VII * * * must be filed by the Department of Justice

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[5] Petitioner relies on three district court decisions rejecting efforts by the EEOC to join school boards to pending suits against teachers' unions. See Pet. 12-13 (citing *EEOC* v. *Elgin Teachers Ass'n*, 658 F. Supp. 624 (N.D. Ill. 1987), *EEOC* v. *American Fed'n of Teachers, Local No. 571*, 761 F. Supp. 536 (N.D. Ill. 1991), and *EEOC* v. *Oak Park Teachers' Ass'n*, 45 Fair Empl. Prac. Cas. (BNA) 444 (N.D. Ill. Dec. 31, 1985)). In those cases, however, the EEOC's claims against the teachers' unions arose out of discriminatory collective bargaining agreements that the unions had negotiated with their respective school boards. See *Elgin*, 658 F. Supp. at 624; *Local 571*, 761 F. Supp. at 537; *Oak Park*, 45 Fair Empl. Prac. Cas. at 445. Those suits therefore called into question the legality of the school boards' conduct *as employers covered by Title VII*. In dismissing the school boards from the EEOC's lawsuits, the district courts reasoned that because the school boards were governmental respondents, the EEOC was obligated under Title VII to "take no further action" against them and to "refer the case to the Attorney General" instead. See, *e.g.*, *Local 571*, 761 F. Supp. at 539. The instant case, by contrast, involves no challenge to the Navajo Nation's own employment practices. Rather, the EEOC's claim for relief is solely against a private employer (*i.e.*, petitioner).

rather than the [EEOC]." Title VII's definition of "employer," however, specifically excludes "an Indian tribe." 42 U.S.C. 2000e(b). If, as petitioner contends, an attempt to join the Navajo Nation as a party to a preexisting enforcement action against a private employer were the legal equivalent of a Title VII suit brought directly against the Nation, then neither the EEOC *nor* the Attorney General would be empowered to take that step, since Indian Tribes—including the Nation—are excluded from Title VII's definition of "employer."

Indeed, the apparent logical implication of petitioner's overall theory is that the legality of petitioner's employment preference for members of the Navajo Nation can *never* be effectively adjudicated by a federal court, either in a suit brought by the EEOC solely against a private employer such as petitioner, or in an enforcement action brought by the Attorney General. Petitioner clearly regards the Navajo Nation's connection to this case as sufficient to bring the Nation within one or both of the categories described in Federal Rule of Civil Procedure 19(a)(1)-(2), since petitioner initially moved for dismissal of the EEOC's suit and/or for summary judgment on the ground that the Nation was a "necessary and indispensable party." Pet. App. 32a. Petitioner construes Rule 19(a) to authorize joinder, however, only if the plaintiff has an independent cause of action against the party to be joined. Under that reading of the Rule, the Nation could not be joined in any Title VII suit against petitioner, regardless of the identity of the plaintiff, because the Nation is excluded from Title VII's definition of "employer."[6]

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[6] Petitioner obliquely suggests that the Attorney General would have a potential cause of action against an Indian Tribe under the "pattern

Petitioner's ultimate objective, moreover, is to obtain dismissal of this suit in its entirety on the ground that the Nation is an "indispensable" party within the meaning of Federal Rule of Civil Procedure 19(b), so that the Nation's insusceptibility to joinder will prevent the EEOC's claims against petitioner from going forward *at all*. See p. 10, *supra*. If petitioner's understanding of Rule 19 and Title VII were adopted by this Court, there would be no evident basis for a different result in an enforcement action brought against petitioner by the Attorney General. Neither Title VII nor Rule 19, however, immunizes a private employer such as petitioner from suit for unlawful employment discrimination.

As the court of appeals emphasized, petitioner is entitled to argue on remand that the circumstances under-

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or practice" provisions of Title VII, 42 U.S.C. 2000e-6(a). See Pet. 19, 23; Reorganization Plan No. 1 of 1978, § 5, 42 U.S.C. 2000e-4 note, at 621 (transferring to Attorney General from EEOC the authority to bring suit against public sector defendants under Section 2000e-6). That suggestion is problematic in at least two respects. First, it is not clear that the Nation's negotiation of mineral leases calling for employment preferences for tribal members would constitute a "pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]," 42 U.S.C. 2000e-6(a), even if petitioner's use of the preference in its own hiring decisions were ultimately held to violate the statute. Second, Section 5 of the 1978 Reorganization Plan vests the Attorney General with authority over the "initiation of litigation with respect to State or local government, or political subdivisions under [42 U.S.C. 2000e-6]." 42 U.S.C. 2000e-4 note, at 621. Although Indian Tribes have governmental status and prerogatives, they are not States, and they are not naturally or routinely referred to as "local government[s]" or "political subdivisions." If authority to file "pattern or practice" suits against Indian Tribes has not been transferred to the Attorney General under the 1978 Reorganization Plan, then that authority rests with the EEOC. See 42 U.S.C. 2000e-6(e).

lying the hiring practices at issue here provide a defense to the EEOC's Title VII claim. But petitioner is wrong in suggesting that it need not even answer that claim.[7]

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[7] Petitioner contends (Pet. 22) that because the pertinent lease provisions were reviewed and approved by the Department of the Interior when they were first negotiated some 40 years ago, "the Nation and petitioner should be entitled to rely on the continuing validity of the federally approved preference provisions unless and until appropriate action is taken by the Department of Interior and/or Department of Justice." That argument goes to the merits of the EEOC's Title VII claim, which the court of appeals in this case pointedly declined to address. See Pet. App. 15a, 18a. On remand, petitioner may argue that its challenged employment practices did not violate Title VII because they were undertaken in conformity with leases entered into by the Navajo Nation in its sovereign capacity and approved by a federal agency (or for other reasons). The fact that the Interior Department approved the leases, however, has no bearing on the propriety of joining the Navajo Nation under Federal Rule of Civil Procedure 19(a).

The petition-stage brief for the United States in *Salt River Project Agricultural Improvement & Power District* v. *Dawavendewa*, No. 98-1628, argued that discrimination based on tribal affiliation is, generally speaking, a form of "national origin" discrimination within the meaning of Title VII. 98-1628 U.S. Br. at 6-10. The brief further contended that a preference for members of a particular Tribe is not covered by Title VII's Indian preference exemption, 42 U.S.C. 2000e-2(i). 98-1628 U.S. Br. at 10-15. The brief for the United States noted, however, that the court of appeals in that case had not addressed, and that review by this Court therefore was not warranted to consider, "the questions whether an on-reservation employer's preference for members of a particular Tribe in conformity with an ordinance of that Tribe (or the terms of a lease of the trust property of that Tribe) should be viewed as a political classification, whether such a preference should be viewed as having the effect of preferring persons on the basis of political affiliation rather than national origin, and whether, if viewed as having the effect of preferring persons on the basis of national origin, it could be justified as job related and consistent with business necessity." *Id.* at 9-10.

This Court denied the petition for a writ of certiorari in *Salt River*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

See 528 U.S. 1098 (2000). In its subsequent decision in *Dawavendewa II*, the Ninth Circuit confirmed that it had not yet addressed the potential legal justifications described above that might be proffered in defense of the hiring preference. See 276 F.3d at 1158. In any event, as discussed, the merits of the EEOC's claims are not presented by the interlocutory petition in this case.

(6)

No. 05-353

FILED
JAN 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

Peabody Western Coal Company and
Peabody Coal Company, LLC,

Petitioners,

v.

Equal Employment Opportunity Commission.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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January 3, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR THE PETITIONER

The government acknowledges that Congress in Title VII withdrew from the EEOC the authority to litigate claims directly against government entities, including States and Indian tribes, reserving that power to the Attorney General. BIO 18-19. The government nonetheless defends the Ninth Circuit's holding that the EEOC may circumvent this prohibition by suing a private party and joining a government entity to that suit as an involuntary defendant under Fed. R. Civ. P. 19 for the explicit purpose of obtaining a binding adjudication against that government entity. That holding, which conflicts with the precedent of the Fifth Circuit, leaves the EEOC free to continue its systematic litigation against Indian tribes throughout the Ninth Circuit, which encompasses nearly three-quarters of the nation's tribes. The government does not deny that this litigation constitutes a substantial incursion on tribal sovereignty or that the lawsuits seek to invalidate tribal preference provisions that have been approved by the Department of Interior and are of enormous practical importance to hundreds of tribes within the Ninth Circuit and beyond. In short, the government does not and cannot contest that the decision below will have a "significant impact on the relationship between Indian tribes and the Government," a sufficient reason even apart from the circuit split to grant the petition for certiorari. *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001).

Certiorari is warranted for the further reason that the case presents an untenable intra-governmental conflict on a matter of substantial national importance for private companies and their government contracting partners that cannot be resolved without this Court's intervention. The government acknowledges that petitioner is being sued by the EEOC (including for punitive damages) for implementing a tribal preference required by the Department of Interior. Innumerable other entities are subject to identical Interior-

imposed requirements, all of which are unlawful according to the EEOC. The Solicitor General goes out of his way to cast doubt on the EEOC's dubious interpretation of Title VII, which the EEOC nonetheless will continue to pursue absent review in this Court. BIO 23 n.7. As petitioner has explained, Pet. 20-24, Congress provided a solution to this dilemma by requiring that all litigation involving government entities be undertaken by the Attorney General, who represents the Department of Interior, thus ensuring that in tribal matters, the federal government speaks with one voice. The consequences of the Ninth Circuit's unraveling of that sensible solution are evident in this case.

I. Certiorari Is Warranted In Light Of The Importance Of The Question Presented To The Relationship Between The Federal Government And State And Tribal Governments.

The government has not, and cannot, contest the overriding importance of the question presented to the sovereign interests of both tribes and state governments. Although this case presents a question of broad significance regarding the proper interpretation of Rule 19 generally, see Pet. 9-15, it arises in a specific context that is independently worthy of this Court's attention in two important respects.

1. First, as discussed below and in the amicus brief filed on behalf of seven western states, the Ninth Circuit's holding eviscerates the structural protections Congress intended to provide government entities subject to suit under Title VII. See Pet. 20-24; Brief of Amicus Curiae State of New Mexico et al (States Br.) 10-16. The States' view that the Ninth Circuit's decision threatens their sovereign interests is well supported. For example, the decision would permit the EEOC to join a State to a suit against a state highway contractor that implements a provision of its state contract calling for a hiring preference or employment test that the EEOC views as illegal under Title VII. And, in fact, the EEOC has previously attempted to use Rule 19 as a means of

litigating claims against local governments. See States Br. 11-14. Unless the decision below is reversed, the EEOC will be permitted to continue that practice throughout the Ninth Circuit. See Pet. 12-13.[1]

2. Second, the EEOC's litigation tactic arises in a context of vital importance to the nation's Indian tribes and has resulted in an avoidable inter-agency conflict that has put both tribes and their contracting partners in a completely untenable position that, the government's brief makes clear, will not be remedied absent intervention by this Court.

The amicus briefs demonstrate that the legality of tribal preference provisions is a question of enormous importance to Indian tribes and is the subject of recurring litigation with the EEOC. As the brief for the National Congress of American Indians (NCAI) explains, "[m]ost of the major Indian tribes today have * * * ordinances granting employment preferences to Indians generally or to certain Indians." Br. 5. Many, like the Navajo Nation's, require preferences (or a superior preference) for the tribe's own members. *Ibid.* Such tribal preferences have been incorporated in hundreds, if not thousands, of leases nationwide. See NCAI Br. 5-7; Nation Br. 1 (hundreds of leases in Navajo Nation alone). The amici

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[1] The government suggests a distinction between the EEOC's cases against school boards and this litigation, noting that the prior suits "called into question the legality of the school boards' conduct as employers covered by Title VII" whereas the Navajo Nation is not an "employer" within the meaning of Title VII. Br. 20 n.5 (emphasis omitted). But the government takes care *not* to assert that this distinction makes a legal difference or that the school board cases were correct In dismissing the EEOC's suits. In any event, the Ninth Circuit's decision made no such distinction, holding instead that the EEOC may join a government entity under Rule 19 even if it is precluded under Title VII from suing it directly. See Pet. App. 11a, 14a. Thus, nothing in the government's brief or the court of appeals' decision diminishes the threat to state sovereignty created by the decision below.

further explain that these preferences are a traditional and vital means of ensuring that the tribe retains the benefits of the employment opportunities created by the development of the tribe's own natural resources. See, *e.g.*, Navajo Br. 1 (preference provisions are "a primary, bargained-for consideration" for its mining contracts); NCAI Br. 3-4; see also States Br. 1 (Navajo Nation's unemployment and poverty rate above 40% and the tribe's dependence on mining to provide 50% of revenue).

Congress has specifically required the Department of Interior to review and approve all leases of tribal land extending seven years or more, see 25 U.S.C. 81(b), and to "refuse to approve an agreement or contract" if it "determines that the agreement or contract * * * violates Federal law," *id.* § 81(d). Acting pursuant to that authority, the Department of Interior has repeatedly approved of, and indeed required, tribal preferences in Indian leases, including the leases at issue in this case. See Pet. 5 (Interior wrote preference provisions into Peabody leases). In fact, as the amicus briefs demonstrate, the Department has approved such provisions in hundreds of leases over many decades, including leases presented as recently as 2002. See Navajo Br. 1; Brief of Amici Curiae Bashas' Inc. and Salt River Project Agricultural Improvement and Power District (Bashas' Br.) 4-5.

The EEOC, however, disagrees with the Department of Interior's interpretation of Title VII and has made clear that it intends to systematically challenge these tribal preference provisions by suing private contractors and joining the tribes under Rule 19, so long as it is permitted to do so. See BIO 3; Basha's Br. 1-2. Thus, for example, the EEOC recently filed suit against Basha's under the authority of the Ninth Circuit's decision in this case. See, *e.g.*, Bashas' Br. 10.

Although this petition presented the government with the opportunity resolve this inter-agency division, it has been unable or unwilling to do so. Thus, the brief makes clear that if this Court denies certiorari, the EEOC will continue to

pursue the litigation in this case. At the same time, nothing in the brief states or even suggests that the Department of Interior has changed is view or practices and intends to retreat from its position that employers such as Peabody and Basha's are required to employ the very preferences that the EEOC maintains are illegal and indeed justify the imposition of punitive damages. For his part, the Solicitor General has taken pains not only to avoid approving of the EEOC's interpretation of Title VII, but even goes so far as to suggest that it may be wrong. See BIO 23 n.7. Nonetheless, the government contends that all this litigation must be allowed to march forward at considerable cost to private parties and sovereign Indian tribes.[2]

While this conflict is untenable, it is not inevitable. As the petition explained, Pet. 20-24, Congress provided a solution within Title VII itself, requiring that all litigation involving government entities, including Indian tribes, be conducted by the Attorney General, who *does* have authority over the positions taken by the Department of Interior and can, therefore, ensure that the federal government speaks with a single voice to tribes and their contracting partners. See Pet. 21-24. However, that solution can only be made effective by this Court's granting certiorari in this case and reversing the judgment of the Ninth Circuit.

3. This Court has repeatedly granted certiorari to resolve questions of importance to the sovereign interests of Indian tribes without regard to whether they presented a circuit conflict. See Pet. 15 (citing cases). Moreover, given the importance of the interests at stake, this Court's intervention

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[2] The government attempts to downplay the seriousness of this imposition by noting that petitioner may raise Interior's approval of the lease as a defense on remand. BIO 22-23. But that offer of reassurance rings hollow. The government clearly does not believe the leases are a valid defense. Otherwise, the EEOC would not have brought the suits in the first place or would have mooted this petition by agreeing to dismiss the action below.

should not be delayed. Standing alone, the Ninth Circuit's decision will subject nearly three-quarters of the nation's federally recognized tribes to the tactics employed by the EEOC in this case. See NCAI Br. 6 (Ninth Circuit contains 74% of recognized tribes). In *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), the Court granted certiorari to decide a Freedom of Information Act question involving Indian tribes in response to a petition by the United States that acknowledged that no other court had decided the question presented. See Pet. 27. However, the government successfully argued that immediate review was nonetheless warranted in light of the importance of the question and the comprehensiveness of the Ninth Circuit's jurisdiction over tribal affairs. *Ibid.* There is no reason for a different result in this case. Indeed, the question in this case is of far greater significance to tribal interests than was issue in *Klamath Water Users*. See NCAI Br. 3-7; Navajo Br. 3-9.[3]

II. The Court Of Appeals' Decision Is Wrong.

The government contends that the decision below was not erroneous, but that claim misconceives petitioner's argument as well as the scope of Rule 19 and the EEOC's authority under Title VII.

Contrary to the government's assumption, petitioner does not argue in this Court that "Rule 19(a) imposes the additional requirement that * * * the EEOC have an independent cause

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[3] That this petition is brought by a private company rather than a tribe is no reason to hesitate granting certiorari. The only reason the Navajo Nation is not the petitioner in this case is that the Ninth Circuit decided the joinder question in response to petitioner's motion for summary judgment for failure to join a necessary party; as a result, the Nation was never a "party" in the district court with the ability to appeal. However, as the Nation's amicus brief makes clear, the tribe supports the petition, desiring an immediate resolution of the question presented, and will continue participate if certiorari is granted.

of action against the Nation." BIO 11. Petitioner claims only that where, as in this case, Congress has made plain its intent to affirmatively preclude litigation between two parties, that intent may not be circumvented through joinder under Rule 19. See Pet. 27. Declining to provide an explicit cause of action is not, in itself, sufficient grounds for concluding that Congress has precluded a party from litigating a claim against another through Rule 19. See Pet. 27-28 (discussing, *inter alia*, *Martin* v. *Wilks*, 490 U.S. 755 (1989)). In this case, however, by assigning the authority to engage in Title VII litigation against government entities to the Attorney General alone, Congress plainly precluded the EEOC from engaging in such litigation itself. Rule 19 cannot provide an avenue for circumventing that intent. See Pet. 26-27.

The government contends that Congress did not, in fact, intend to prevent the EEOC from litigating claims against government entities through joinder, see BIO 18-23, but that assertion is wholly unconvincing. See, *e.g.*, Pet. 17-25; States Amicus Br. 4-14; Navajo Br. 9-17. The government's principal argument is that the provision authorizing the EEOC to sue private employers, but not government entities, Section 2000e-5(f)(1), "does not address the situation presented here" because the Tribe is not sued in its capacity as "respondent." BIO 19. But if the litigation is not authorized (and limited) by Section 2000e-5(f)(1), the natural conclusion is that there is no statutory authorization for the litigation at all, not that the EEOC may enjoy the authority of the provision while disregarding its limitations. See Pet. Br. 19-20.

The government responds that the EEOC *must* have this claimed extra-statutory authority to litigate against a tribe through joinder because otherwise "neither the EEOC *nor* the Attorney General would be empowered to take that step since Indian Tribes – including the Nation – are excluded from Title VII's definition of 'employer.'" BIO 21 (emphasis in

original)[4] This is simply not the case. The statutory authority to sue non-employers that interfere with Title VII rights is provided for in 42 U.S.C. 2000e-6(a), which authorizes the Attorney General to bring suit against "any person or group of persons * * * engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title." The government suggests in passing that this view is "problematic," but does not claim that it is wrong. BIO 21-22 n.6. The government's reservations are both surprising and unpersuasive.[5] In any case, even if Title VII did not expressly authorize the Attorney General to sue an Indian tribe in these circumstances, that hardly compels the conclusion that it intended for the *EEOC* to wield that authority indirectly through joinder. The more natural conclusion is that any implicit authority to litigate against a tribe belongs to the Attorney General. See Pet. 19-20.

The government argues that Congress intended to remove those limitations when the EEOC litigates claims against government entities through joinder rather than direct suit, because joinder "does not expose the Nation to the remedies authorized by Title VII, nor does it rest on any allegation that the Nation itself has violated the statute." BIO 20. Both assertions are inaccurate, but the argument would fail in any

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[4] This argument has no relevance to the joinder of other government entities, such as States, which are not excluded from the Title VII definition of "employer." See 42 U.S.C. 2000e(b).

[5] Petitioner's reading of the provision is consistent with the plain terms of the statute and with EEOC guidance. See EEOC Compliance Manual § 2(B)(3)(ii) ("For example, an allegation of selective enforcement of a licensing requirement against African-Americans or some other protected class would constitute an allegation of pattern or practice discrimination covered by Section 707."). Moreover, although the Reorganization Plan does not specifically mention tribes, there can be no doubt that the intent of the plan is to create a parallel allocation of authority under both Section 706 and 707. Contra BIO 22 n.6.

event. First, the judgment the EEOC seeks in this case against the tribe is indistinguishable in every meaningful respect from a direct Title VII action for declaratory judgment against the tribe. See States' Br. 9; Pet. App. 43a. Second, even if the EEOC does not claim that enactment of a tribal preference statute or the enforcement of a lease preference term directly violates Title VII (but see 42 U.S.C. 2000e-6), the EEOC nonetheless contends that enforcement of preferences required by tribal law are precluded by federal law. Thus, the litigation plainly imposes the most serious injuries Congress intended to avoid when it restricted the EEOC's authority to litigate against government entities, namely the cost and indignity of being hauled before a federal court to defend against an attempt to invalidate government rules and practices. That the litigation will not immediately result in the additional injury of an injunction is of little significance. The government cannot seriously claim that the Nation would (or even could) flout the federal court judgment declaring its preferences illegal under federal law.

III. The Ninth Circuit's Holding Conflicts With The Fifth Circuit's Decision in *Vieux Carre.*

As the Ninth Circuit itself recognized, Pet. App. 13a, its decision conflicts with *Vieux Carre Prop. Owners* v. *Brown*, 875 F.2d 453 (CA5 1989). In both cases, a plaintiff charged that a joint private-government action was in violation of a federal statute, but federal law permitted the plaintiff to sue only one of the participants directly. In *Vieux Carre*, the Fifth Circuit recognized that Congress divided authority for suing private and government entities for alleged violations of the Rivers and Harbors Act, permitting private plaintiffs to sue the Army Corps of Engineers under the APA, while giving the responsibility for suits against developers solely to the Attorney General. 875 F.2d at 456-57. That allocation of authority, the Fifth Circuit held, could not be circumvented by recourse to Rule 19. *Id.* at 457. The Ninth Circuit, however, held the opposite here, concluding that the division of direct

litigating authority under Title VII does not affect the application of Rule 19. Pet. App. 11a.

The government's attempt to distinguish *Vieux Carre* fails. The Fifth Circuit did not turn on whether the joinder was attempted at the outset of the litigation or later in the case. Contra BIO 14. The government points out that the plaintiff there sought an injunction against the absent party, while the EEOC seeks only a declaration that the Nation's preference are illegal. *Id.* 14-15. As discussed above, this is a distinction without any meaningful difference. The Fifth Circuit notably made no mention of the request for an injunction when it gave its three reasons for holding that the private developers could not be subject to suit under Rule 19. See 875 F.2d at 457.[6] Finally, that *Vieux Carre* did not decide whether the suit should be dismissed if the absent party could not be joined, BIO 16, is beside the point. The petition presents only the question whether the EEOC may join the tribe notwithstanding Title VII's limitations on its authority, not whether the suit must be dismissed if the tribe cannot be joined, a question the Ninth Circuit did not reach.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, this Court should grant the petition for certiorari.

Respectfully submitted,

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[6] Moreover, although the Ninth Circuit pointed out that the EEOC was not seeking a direct injunction against the Nation in this case, it based its decision on the general principle that any party may be joined to a litigation "for the sole purpose of making it possible to accord complete relief between those who are already parties," relying on cases that permit an injunction against the joined party. See Pet. App. 11a (relying on, *e.g.*, *National Wildlife Fed'n* v. *Espy*, 45 F.3d 1337, 1344 (CA9 1995)).

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January 3, 2006

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Supreme Court, U.S.
FILED
DEC 19 2005
OFFICE OF THE CLERK

No. 05-353

IN THE

Supreme Court of the United States

Peabody Western Coal Company and
Peabody Coal Company, LLC,
Petitioners,

v.

Equal Employment Opportunity Commission.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE BASHAS' INC. AND SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF PETITIONER ON THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff may join as an involuntary defendant under Federal Rule of Civil Procedure 19 a party who the plaintiff is prohibited from suing directly. In this brief, *amici*, Bashas' Inc. and Salt River Project Agricultural Improvement and Power District explain the compelling reasons for the Court to grant the writ.

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INTEREST OF THE AMICI[1]

Amicus, Bashas' Inc. ("Bashas'"), was founded in 1932 in Chandler, Arizona. The company started as a family supermarket with one location, and has grown to over 150 stores with various store formats all in Arizona, except one store on a Native American Reservation in New Mexico and one store in Needles, California. The store formats called Diné Markets are located on the Navajo Nation in Arizona and New Mexico. Bashas' also has Bashas' stores on the Tohono O' odham, White Mountain Apache and San Carlos Apache Nations.

Bashas' is currently involved in parallel litigation with the Equal Employment Opportunity Commission ("EEOC"), E.E.O.C. v. Bashas' Inc., Case No. 2:05-cv-02382 PHX SMM, pending in United States District Court for the District of Arizona. Simultaneously, the Navajo Nation has directed Bashas' immediately to come into full compliance with the Navajo Preference in Employment Act ("NPEA"), which requires Bashas' to give a preference in hiring to Navajos and to adopt a written Navajo Affirmative Action Plan.

Amicus, Salt River Project Agricultural Improvement and Power District ("SRP") is a municipal corporation and political subdivision of the State of Arizona. *See* Ariz. Const. Art. 13, §7; A.R.S. §48-2302; *see also Ball v. James*, 451 U.S. 355 (1981). SRP has an ownership interest in, and operates on behalf of all the owners, the Navajo Generating Station ("NGS"), located on reservation land of the Navajo Nation. NGS is located on the Navajo Nation's land pursuant to a lease between the owners and the Navajo Nation, entered into in 1969 and approved by the United States Secretary of the

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[1] No person or entities other than *amici* and their counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

Interior. The lease obligates SRP to give preference in employment to qualified local Navajos.

SRP was the defendant in *Dawavendewa v. Salt River Project Agr. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), in which the EEOC unsuccessfully attempted to intervene. Because SRP is a political subdivision of the State of Arizona, the EEOC may not bring, or intervene in, a civil action against SRP, but the United States Attorney General may do so. 42 U.S.C. §2000e-5(f)(1).

INTRODUCTION

Petitioner Peabody Coal is not the only employer caught in a battle between governmental entities - the EEOC and Native American Nations. Bashas' operates on three reservations. Bashas' is being sued simultaneously by the EEOC for following Navajo law and the Navajo Nation Labor Commission and The Navajo Nation Office of Navajo Labor Relations have ordered Bashas to comply fully with Navajo employment law. Similarly, SRP operates a large power plant on the Navajo reservation. The EEOC has, in the past, attempted to intervene in an action challenging SRP's obligation to give Navajo employment preference under its lease with the Navajo Nation. The Court should grant certiorari to resolve whether the EEOC may use Rule 19 and a suit against a private entity as a method to litigate the legality of tribal preference laws.

REASONS FOR GRANTING THE WRIT

Bashas' and SRP (and other employers) have significant operations on tribal lands. Both the White Mountain Apaches and Navajo Nation require Bashas' to comply with lease provisions and laws that require preferences in employment be given to their tribal members.

Tribal laws and leases with the tribes conflict with the EEOC's interpretation of Title VII. Employers are put in the untenable position of having to choose whether to violate Title VII or tribal law and leases.

I. FACTUAL INFORMATION RELEVANT TO AMICI PETITION

Bashas' operates seven stores on the Navajo Nation. These stores employ over 400 employees. The stores are located in Chinle, Arizona; Crown Point, New Mexico; Dilkon, Arizona; Kayenta, Arizona; Pinon, Arizona; Tuba City, Arizona; and Window Rock, Arizona. For each of these stores, Bashas' has a lease with the Navajo Nation.

A. PEFERENCE PROVISIONS OF TRIBAL LEASES

Each lease requires Bashas' to give preference in hiring to Navajos. Each of these leases was approved by the United States government, through the Department of the Interior, Bureau of Indian Affairs.

For example, a lease approved in 2002 which governs the Dilkon store requires:

> **NAVAJO EMPLOYMENT.**
>
> Lessee agrees to comply with the Navajo Preference in Employment Act in conducting its operations from the Leased Premises. In addition to satisfying the requirements of the aforementioned Act, Lessee agrees to use reasonable efforts to (a) employ a minimum of seventy percent (70%) persons entitled to preference under the Navajo Preference in Employment Act in its Dilkon store at all times during the first three years of its operation, eighty percent (80%) during the fourth through sixth years of its operation, and ninety percent (90%) during the seventh through tenth years of its operation; (b) employ a minimum of ninety-five percent (95%) person [sic] entitled to preference under the Navajo Preference in Employment Act in its Dilkon store at all times after the first ten (10) years of the Lease; and (c) prepare an affirmative action program for submittal to Lessor within one (1) year after opening for business which will define Lessee's plan for developing persons entitled to preference under the Navajo Preference in Employment Act to hold the positions of store manager, assistant manager and department manager positions in it Dilkon store. Such affirmative action plan will contain affirmative steps whereby Lessee will provide upward mobility such as training, job enrichment and other positive employee develop-

> ment factors. Said plan is understood to provide for the benefit of the Navajo people in terms of job and advancement with a primary goal of having a Navajo store manager in Dilkon no later than the commencement of the sixth (6th) year of operation and Navajos represented proportionately in all levels of operation.

This lease was approved on August 21, 2002 by the Regional Director, Navajo Region, for the Bureau of Indian Affairs. (The leases for other stores were all signed long after Title VII went into effect.)

Bashas' operates stores on three other Native American Nations. Bashas' operates one store on the White Mountain Apache Nation (in White River, Arizona) employing over 50 employees and another store on the San Carlos Apache Nation (in San Carlos, Arizona) employing over 60 employees. Bashas' operates one store on the Tohono O' odham Nation (in Sells, Arizona) employing 45 employees.

B. TRIBAL PREFERENCE LAWS

In addition to lease requirements, at least two nations require employers to give preference in hiring to tribal members. The Navajo Nation requires that:

> All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:
>
> 1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job clas-

> sifications including supervisory and management positions.[2]

NPEA, 15 Nav. Nation Code §604 (A) (1). The White Mountain Apache Nation requires that:

> All non-tribal employers operating within the exterior boundaries of the Fort Apache Indian Reservation are hereby required to give preference to Indians in hiring, promotion, training and all other aspects of employment. Said employers shall comply with the rules, regulations, and guidelines of the Labor Relations Department which set forth the specific obligations of the employer in regard to Indian Preference.

The White Mountain Apache Labor Code, Section 1.4(A), defines Indian Preference as:

> Indian Preference means the following priority order of preference:
>
> (1) Enrolled member of the White Mountain Apache Tribe.
> (2) Indian spouse of an enrolled member of the White Mountain Apache Tribe.
> (3) Other Indians.
>
> The White Mountain Apache preference applies to all employment activities, including those undertaken pursuant to the Indian Self Determination and Education Assistance Act, P.L. 93-638, as amended, except for em-

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[2] The preference also extends to Non-Navajos legally married to Navajos. NPEA, 15 Nav. Nation Code §614 (A).

ployment funded by government programs unrelated to the Indian Self Determination Act, which shall have the following priority order of preference:

(1) Local Indian.

(2) Other Indians.

White Mountain Apache Labor Code, Section 1.2. The White Mountain Apaches reaffirmed their preference act in 1995 as applying to all employers, except where certain federally funded programs are involved and acknowledged that some federal agencies did not agree to the use of tribal preferences:

WHEREAS, the Tribal Council established the TERO Code, as part of the Tribal Labor Code to regulate employment in construction activities on the Reservation; and

WHEREAS, the TERO Code grants a preference in the employment of members of the White Mountain Apache Tribe over members of any other Indian tribe; and

WHEREAS, such a preference scheme is recognized by contracting agencies, including the federal government, for purposes of the Indian Self-Determination Act; and

WHEREAS, other federal programs recognize an "Indian preference" in tribal employment preferences, but prohibit use of a "Tribal preference"; and

WHEREAS, the conflict over preference priorities in past construction projects has on occasion made it necessary for the Tribe to waive the current employment preference provision in the TERO Code; and

WHEREAS, the Tribal Council will continue to advocate recognition of a tribal preference in all federal grants and funding it receives, the Tribal Council has determined that until all federal agencies agree to the use of tribal preference requirements, the TERO Code should be amended to permit an alternative preference for certain federally-funded programs; and

WHEREAS, the Tribal Council has reviewed the proposed amendment to the TERO Code.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby directs the Tribal Council Secretary to post the proposed amendment to the TERO Code in each District for ten days as required by Constitution.

White Mountain Apache Ordinance No. 203. The White Mountain Apache Labor Code provides for sanctions against an employer who fails to comply with its provisions:

SANCTIONS FOR NON-COMPLIANCE

A. Any employer who fails to comply with the laws, rules, regulations, or guidelines on employment rights of the White Mountain Apache Tribe or who fails to obtain the necessary agreements from its signatory unions shall be subject to sanctions which shall include but are not limited to:

(1) denial of the right to commence business on the Fort Apache Indian Reservation;

(2) fines;

(3) suspension of the employer's operation;

(4) termination of the employer's operation;

(5) denial of the right to conduct any further business on the Fort Apache Indian Reservation;

(6) payment of back pay or other relief in order to correct any harm done to aggrieved Indians; and

(7) the summary removal of employees hired in violation of the White Mountain Apache Tribe's employment rights requirements.

White Mountain Apache Labor Code 2.7.

C. TOLEDO v. BASHAS' INC.

On December 28, 2004, Harrison Toledo, an enrolled member of the Navajo Nation, filed a complaint with the Navajo Nation Labor Commission alleging that his employment was terminated in violation of the NPEA. The Commission held an evidentiary hearing on this complaint on March 24, 2005. In an order dated July 12, 2005, the Commission upheld the termination, but ordered Bashas' to comply with the NPEA and criticized Bashas' for not having a written Affirmative Action Plan. (The Commission excused this deficiency noting that of 370 Bashas' employees on the Navajo Nation, 365 were Navajo.)

D. THE NAVAJO NATION OFFICE OF NAVAJO LABOR RELATIONS

The Navajo Nation Office of Navajo Labor Relations recently required Bashas' to fully comply with the NPEA by implementing and following Affirmative Action Plans that include the preference for Navajos in hiring and "include and specify a Navajo employment preference policy statement in all job announcements and advertisements." NPEA, 15 Nav. Nation Code §604 (B) (1).

E. E.E.O.C. v. BASHAS' INC.

On August 17, 2005, the EEOC filed an action against Bashas' in the United States District Court for the District of Arizona. The EEOC also named the Navajo Nation as a Defendant, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. EEOC v. Bashas' is currently stayed, pending the outcome of this proceeding.

The EEOC alleges Bashas' violated Title VII by giving hiring preferences to members of the Navajo Nation. The EEOC alleges that such preferences violate federal law because Title VII permits only preferences to Native Americans and not members of a specific tribe. The basis of the EEOC's lawsuit is Bashas' alleged decision not to hire Randy Honahni ("Honahni") and Dale Lucero ("Lucero") because neither individual was a member of the Navajo Nation.

Over five years ago, on August 27, 2000, Honahni filed an EEOC Charge of Discrimination ("the Honahni Charge"), alleging that Bashas' discriminated against him on the basis of national origin by giving hiring preferences to members of the Navajo Nation. The EEOC issued a final Determination on September 21, 2001 that Bashas' violated Title VII. Efforts between the EEOC and Bashas' to conciliate the matter failed on December 20, 2001. The EEOC informed Bashas', "No further efforts to conciliate this case will be made by the EEOC. Accordingly, we are at this time reviewing the case for possible litigation."

On December 5, 2001, Lucero filed an EEOC Charge of Discrimination ("the Lucero Charge"). Lucero, like Honahni, alleged Bashas' discriminated against him on the basis of national origin discrimination by giving hiring preferences to members of the Navajo Nation. On February 25, 2003, the EEOC issued a final determination on the Lucero Charge. On June 11, 2003, conciliation efforts failed. The EEOC notified Bashas', "No further efforts to conciliate this case will be made by the EEOC. Accordingly, we are at this time reviewing this case for possible litigation."

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE WHETHER THE EEOC MAY JOIN A PARTY UNDER RULE 19 WHO IS PROHIBITED FROM SUING DIRECTLY

The EEOC has mounted a vigorous campaign against preference laws by suing employers conducting business on tribal lands. The EEOC unsuccessfully attempted to intervene in *Dawavendewa v. Salt River Project Agr. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), has brought the instant matter against Peabody Coal, and now has brought an identical action against Bashas' seeking to change Native American policies endorsed by the Bureau of Indian Affairs, for employers doing business with these sovereign nations.

Bashas' and SRP urge this Court to accept review of this case because the EEOC disagrees with the laws of another nation and is attempting improperly to use Rule 19 to accomplish its ends. Joining a sovereign nation with a private employer will not resolve the irreconcilable conflict between federal law and the laws of a sovereign nation. The Attorney General, as a politically accountable office, would more likely strive to resolve this dispute through sovereign to sovereign negotiations rather than suing a private entity, acting in good faith, for punitive damages as a means for solving a perceived wrong with the laws of another nation.

Bashas' and SRP encourage this Court to review this conflict and resolve whether the EEOC's use of Rule 19 is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 19, 2005

Supreme Court, U.S.
FILED
DEC 19 2005
OFFICE OF THE CLERK

No. 05-353

IN THE

Supreme Court of the United States

PEABODY WESTERN COAL COMPANY *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, *ET AL.*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may, in a Civil Rights Act enforcement-type civil lawsuit against a coal-mining company, make an Indian tribe an unwilling party to the case, by joining the tribe as a party under F.R.Civ.P. Rule 19, when a statute (42 U.S.C. §2000e-5(f)) forbids the EEOC from filing a lawsuit directly against the Tribe, but rather gives the Attorney General that exclusive power (assuming argendo that tribal sovereign immunity has been waived so as to permit it).

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

Established in 1944, the Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native groups. NCAI is dedicated to protecting the rights and improving the welfare of American Indians.

[1] All parties have consented to the filing of this brief, and their consents have been filed with the Clerk. No counsel for a party authored this brief in whole or part, and no person other than amici or their members made a monetary contribution to the preparation or submission of this brief.

In addition to National Congress of American Indians, the other amici are:

> Mandan Hidatsa Arikara Nation, located on the Fort Berthold Reservation, North Dakota.
>
> Eastern Cherokee Band of Indians, located on the Eastern Cherokee Reservation, North Carolina.
>
> White Mountain Apache Tribe, located on the Fort Apache Reservation, Arizona.
>
> Confederated Tribes of Siletz Indians, located on the Siletz Reservation, Oregon.[2]
>
> Metlakatla Indian Community, located on the Annette Islands Reservation, Alaska.
>
> All Indian Pueblo Council, located in Albuquerque, an association of 19 Pueblo Indian tribes in New Mexico, each with its own reservation and government.
>
> Hualapai Tribe, located on the Hualapai Reservation in Arizona.

The tribes who are amici herein have a strong interest in the status quo of their Indian preference laws (usually called "TERO ordinances," meaning tribal employment rights ordinances). On their reservations employers would not employ as many Indians except for the Indian preference ordinances. Unemployment tends to be high on remote Indian reservations. Indian preference laws help insure that qualified Indians are hired for work they can perform, which (1) is an important exercise of tribal self-government; (2) strengthens the tribal community; and (3) reduces need for federal assistance.

In addition to their interests in maintaining their own Indian preference laws, Indian tribes have a statutory right to

---

[2] Siletz does not have an Indian preference ordinance at the present time, but may have one in the future. It supports this brief.

have any challenge to their Indian preference laws be brought only by the U.S. Attorney General as provided in 42 U.S.C. §2000e-5(f)(1), and then only if tribal sovereign immunity has been waived. The EEOC should not be recognized as having power to challenge an unconsenting tribe's laws by way of Rule 19 joinder, as was done here.

ARGUMENT

The immediate issue herein and the issue that brings Amici to this Court, is whether the EEOC can, under F.R.Civ.P. Rule 19, involuntarily implead an Indian tribal government to have its Indian preference laws voided, in the face of 42 U.S.C. § 2000e-5(f), which states:

> "(1) . . . In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. . . ."

The EEOC recognizes that the Navajo Nation is a "government," *see* Pet. App. 35a.

I. INDIAN PREFERENCE LAWS HAVE A LONG HISTORY IN AMERICAN INDIAN AFFAIRS.

The concept of Indian preference has been on the federal statute books for many years. In 1834 Congress enacted what today is 25 U.S.C. § 45, requiring that in all cases of persons "employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties." *See also* 25 U.S.C. § 46 (1882), § 44 (1894), and § 47 (1908).

In 1934, section 12 of the Indian Reorganization Act directed the Secretary of the Interior to set standards of ability

for Indians who may be appointed as administrators of service to Indians, and such qualified Indians "shall hereafter have the preference to appointment to vacancies in any such positions." 25 U.S.C. § 472.

In 1950 Congress enacted the Navajo-Hopi Rehabilitation Act which provides that "Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws." 25 U.S.C. §633.

In 1964 Congress enacted the Civil Rights Act which prohibited discrimination in private employment, but at the same time exempted preferential employment of Indians by tribes or industries located on or near Indian reservations. 42 U.S.C. §§ 2000e(b) and 2000e-2(i).

In 1972 Congress required that Indians be given preference in Government programs for training teachers of Indian children. 20 U.S.C. §§ 887c(a) and (d), and § 1119a.

In 1975 the Indian Self-Determination Act provided certain Indian preferences,[3] which were amended in 1994 to add that with respect to any self-determination contract that is intended to benefit one tribe, "the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract . . . ." 25 U.S.C. § 450e(c).

In 1972, this Court ruled that the Indian preference laws governing employment in the U.S. Bureau of Indian Affairs, were constitutionally permissible under the Equal Employment Opportunities Act of 1972, because they were not

---

[3] 25 U.S.C. § 450e(b). The following year the Indian Health Service was authorized to give preference to Indians in construction of Indian health facilities. 25 U.S.C. § 1633.

racially based, but are "reasonably designed to further the cause of Indian self-government ... ." *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (unanimous).

II. MOST MAJOR INDIAN TRIBES TODAY HAVE TRIBAL EMPLOYMENT RIGHTS ORDINANCES, I.E. INDIAN PREFERENCE LAWS

Most of the major Indian tribes today have TERO ordinances granting employment preference to Indians generally or to certain Indians. For example the TERO ordinance of Amicus White Mountain Apache Tribe grants three tiers of preference—first to tribal members; then to Indian spouses of tribal members; and finally to other Indians. *See* Appendix A. Some, like Navajo, have elected to give preference only to their own members. Other tribes have still other versions, according to the choices of the respective tribes. These choices are exercises of tribal self-government, tailored to the uniqueness of each tribal community.[4]

To illustrate the pervasiveness of these ordinances throughout Indian country, amici point to the Council of Tribal Employment Rights.[5] This is a coalition of Indian tribes who have TERO ordinances and desire the benefit of networking with other tribes who also have TERO ordinances. Speaking

---

[4] It is our understanding that the EEOC does not object to tribal laws that grant employment preference to all Indians, but objects to those which grant preference only to Indians who are members of the governing tribe, such as the Navajo TERO ordinance ultimately to be in question in the instant case if the Ninth Circuit ruling is allowed to stand.

[5] Council of Tribal Employment Rights, founded in 1978, is headquartered in Phoenix. It currently has 101 dues-paying members. It has provided TERO training to the BIA and other government agencies, and has helped tribes secure TERO contracts from the EEOC. It is funded by grants from the Administration for Native Americans, contracts with federal agencies and others, and membership dues. CTER is not an amicus in this proceeding.

of the tribes in the lower 48 states (i.e. excluding Alaska and Hawaii), there are currently 101 dues-paying tribes who are members of CTER. Most of these are well-known tribes with well-organized governments.[6]

As for the Alaska Native organizations, the CTER estimates that the Alaska Native organizations who are among its members represent directly or indirectly about 150 of the 229 federally recognized Alaska Native organizations on the Secretary's list.

These numbers are presented in order to illustrate the nation-wide impact that would ensue should there be any change to the status quo of TERO ordinances, and to the exclusive power of the Attorney General to challenge them (assuming arguendo that tribal sovereign immunity has been waived). The impact would be especially severe were the decision of the Ninth Circuit allowed to stand. Within that Circuit reside 74% of the 564 federally recognized tribes.[7]

If tribal TERO ordinances can be federally challenged at all (and they cannot be unless tribal sovereign immunity is held to have been waived), then it is important to tribes that the challenge be made only by the Attorney General, as Congress intended, and not by the EEOC. The reason is that the Attorney General is much more politically sensitive than the EEOC, and rightly so, since interference with tribal laws involves interference with a sovereign government, which

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[6] According to the Secretary's latest official list of federally recognized Indian tribes, there are 335 such tribes in the lower 48 states. 70 Fed. Reg. 71194 (Nov. 25, 2005). The 101 tribes who are members of CTER tend to be the larger and more organized tribes. Not all major tribes are members; Navajo, for example, is not a member. A list of these tribes appears as Appendix B, and also on the website of an Indian tribe: tulaliptero.com/terowebapplications/terodirectory.aspx.

[7] Of the 564 tribes listed in the Secretary's list of federally organized tribes (229 in Alaska and 335 in the lower 48 states), 419 are within the Ninth Circuit (229 in Alaska and 190 in the lower 48—or 74%.

is inherently a political matter, a factor not relevant to the EEOC's primary mission. The Attorney General would be more likely to settle differences by negotiation rather than by litigation, and more likely to give weight to tribal cultural factors and the trust relationship of the United States to Indian tribes.[8]

III. THE CIRCUITS ARE SPLIT ON RULE 19

As argued in Peabody Coal's Petition for Certiorari, there is a split between the Circuit Courts of Appeals as to whether Rule 19 permits involuntary joinder of a party defendant, where the plaintiff lacks power to sue directly. Petn. p. 8-15. It is inappropriate that Indian tribes in some circuits have rights that are denied similarly situated tribes in other circuits. This Court should grant the Petition in order to make Rule 19 uniform for all circuits.

IV. THE UNITED STATES HAS A CONFLICT OF INTEREST IN THIS MATTER

This Court should note that the United States has a conflict in this matter. On the one hand, it has an interest (through the EEOC) in enforcing the equal employment opportunity laws. On the other hand, it has a fiduciary relationship with the Indian tribes of this county, *see e.g., United States v. Mitchell*, 463 U.S. 206, 225 (1983), and through the Secretary of the Interior, 43 U.S.C. § 1457(10), an obligation to support tribal self-governance decisions. *See Morton v. Mancari*, supra.

This Court should grant Certiorari to determine the proper balance to be struck between these interests.

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[8] The Department of Justice actually has a desk devoted to the interplay between tribal and federal interests—the Office of Tribal Justice.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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December 19, 2005

APPENDICES

APPENDIX A

ORDINANCE 203 OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION

BE IT ENACTED by the White Mountain Apache Tribal Council in Council Assembled that Chapter One, Section 1.2D. of the Labor Code of the White Mountain Apache Tribe shall be amended as follows:

D. Indian preference means the following priority order of preference:

(1) Enrolled member of the White Mountain Apache Tribe.

(2) Indian spouse of an enrolled member of the White Mountain Apache Tribe.

(3) Other Indians.

The above preference priority applies to all employment activities, including those undertaken pursuant to the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended, except for employment funded by federal government programs unrelated to the Indian Self-Determination Act, which shall have the following priority order of preference:

(1) Local Indian.

(2) Other Indian.

The foregoing ordinance was on December 20, 1995, duly adopted by a vote of 10 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article IV, Section 1 (a), (i), (s), (t) and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993, and approved by the Secretary of the Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

/s/ _____

APPENDIX B

Council of Tribal Employment Rights
2005

I. Alaska Region	State
1. Alaska Native Coalition on Employment and Training	AK
2. Aleutian/Pribilof Islands Association	AK
3. Arctic Slope Native Association	AK
4. Association of Village Council Presidents	AK
5. Bristol Bay Native Association	AK
6. Central Council Tlinget and Haida Indians	AK
7. Chugachmiut Inc.	AK
8. Cook Inlet Tribal Council	AK
9. Copper River Native Association	AK
10. Kawarek Inc.	AK
11. Kodiak Area Native Association	AK
12. Maniilaq Manpower	AK
13. Metlakatla Indian Community	AK
14. Sitka Tribe	AK
15. Tanana Chiefs Conference	AK

II. Dakota Coalition	
Cheyenne River Sioux	SD
Crow Creek Sioux	SD
Lower Brule Sioux	SD
Oglala Sioux	SD
Omaha Tribe	NE
Rosebud Sioux	SD
Sisseton Wahpeton Sioux	SD
Spirit Lake Sioux	ND
Standing Rock Sioux	ND
Three Affiliated Tribes (Mandan, Hidatsa, Arikara)	ND
Turtle Mountain Chippewa	ND
Yankton Sioux	SD

III. Eastern Region	State
1. Alabama Intertribal Council	AL
2. Eastern Band of Cherokees	NC
3. Mohegan	CT
4. Narragansett	RI
5. Poarch Band of Creek Indians	AL
6. Seminole Tribe of Florida	FL
7. Seneca Nation	NY
8. Wampanoag Tribe of Gay Head (Acquinnah)	MA

IV. Great Lakes Region	
1. Bois Forte Tribe of Chippewa	MN
2. Fond du Lac Chippewa	MN
3. Ho-Chunk Nation	WI
4. Keeweenah Bay Tribe	MI
5. Leech Lake Band of Ojibway	MN
6. Mille Lacs Band of Ojibway	MN
7. Oneida Nation	WI
8. Red Lake Band of Chippewa	MN
9. Stockbridge Munsee Tribe	WI
10. White Earth Band of Chippewa	MN

V. Pacific Northwest Region	
1. Couer d'Alene Tribe	ID
2. Colville Confederated Tribes	WA
3. Confederate Tribes of Siletz	OR
4. Confederate Tribes of Umatilla	OR
5. Confederate Tribes of Warm Springs	OR
6. Ft. McDermitt Pai-Sho	NV
7. Fallon Paiute Shoshone	NV
8. Grande Ronde Tribe	OR
9. Hoopa Valley Tribe	CA
10. Kootenai Tribe	ID
11. Lower Elwha Klallum	WA
12. Lummi Nation	WA

	State
13. Makah Tribe	WA
14. Muckleshoot Tribe	WA
15. Nez Perce Tribe	ID
16. Puyallup Tribe	WA
17. Quinault Nation	WA
18. Shoshone Bannock	ID
19. Shoshone Paiute Duck Valley	NY
20. Spokane Tribe	WA
21. Swinomish	WA
22. Tulalip	WA
23. Upper Skagit	WA
24. Walker River Paiute	NV
25. Yakama Nation	WA
26. Yurok Tribe	CA
VI. Rocky Mountain Region	
1. Blackfeet Nation	MT
2. Chippewa Cree of Rocky Boy Reservation	MT
3. Crow Tribe	MT
4. Fort Peck (Assiniboine/Sioux)	MT
5. Gros Ventre/Assiniboine Tribes (Ft. Belknap)	MT
6. Northern Cheyenne	MT
7. Salish-Kootenai (Flathead)	MT
8. Shoshone and Arapaho Tribes	WY
9. Southern Ute	CO
10. Ute Mountain Ute	CO
VII. Southern Plains	
1. Cherokee Nation	OK
2. Cheyenne and Arapaho Tribes	OK
3. Comanche Tribe	OK
4. Four Tribes Consortium of Oklahoma	OK
5. Kickapoo Tribe in Kansas	KS
6. Kiowa Tribe	

	State
7. Otoe-Missouri Tribes	OK
8. Pawnee Tribe	OK
9. Ponca Tribe	OK
10. Seminole Tribe of Oklahoma	OK
11. Wichita and Affiliated Tribes	OK
VIII. Southwest Region	
1. Big Pine Paiute	CA
2. Bishop Tribe	CA
3. California-Indian Manpower Consortium	CA
4. Chemehuevi Tribe	CA
5. Cocopah Tribe	AZ
6. Colorado River Tribe	AZ
7. Fort Mohave Tribe	CA
8. Gila River Indian Community	AZ
9. Hopi Tribe	AZ
10. Hualapai Tribe	AZ
11. Jicarilla Apache	NM
12. LaJolla Band of Mission Indians	CA
13. Moapa Band of Paiutes	CA
14. Pascua Yaqui Tribe	AZ
15. Quechan Tribe	AZ
16. Reno Sparks Indian Colony	NV
17. San Carlos Apache	AZ
18. San Juan Pueblo	NM
19. San Pasqual Band of Mission Indians	CA
20. Tohono O'Odham Nation	AZ
21. Torres Martinez Desert Cahuilla	CA
22. White Mountain Apache	AZ
23. Yavapai Apache	AZ
24. Zuni	NM

See also www.TulalipTERO.com/TEROWebApplications/TERODirectory.ASPX for virtually the same list.

Summary of CTER Members in the Lower 48 States

Dakota Coalition	12
Eastern Region	8
Great-Lakes Region	10
Pacific NW Region	26
Rocky Mt. Region	10
Southern Plains Region	11
Southwest Region	24
	101
Alaska	15 members representing about 150 of 229 Native groups

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QUESTION PRESENTED

Whether a plaintiff may join as an involuntary defendant under Federal Rule of Civil Procedure 19 a party which the plaintiff is prohibited from suing directly.

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In Defense of Tribal Sovereign Immunity, 95 Harv. L. Rev. 1058 (1982) 8, 9

United States Comm'n on Civil Rights, The Navajo Nation: An American Colony 41 (1975) 2

INTEREST OF THE AMICUS[1]

The Navajo Nation has a direct interest in this case. The Department of the Interior, in its capacity as trustee for the Navajo Nation, drafted and approved leases of Navajo coal in favor of Petitioner Peabody Coal Company and included in those leases a requirement that Peabody give preference in employment to qualified Navajo workers. *See United States v. Navajo Nation*, 537 U.S. 488, 507 (2003); *EEOC v. Peabody Coal Co.*, 214 F.R.D. 549, 555, 561-62 (D. Az. 2002), *rev'd on other grounds*, 400 F.3d 774 (9th Cir. 2005). Although that lease term is permitted by federal law, 25 U.S.C. § 633, the Equal Employment Opportunity Commission sued Peabody for complying with it. That lease term has been included in leases approved and rights-of-way granted on the Navajo Reservation by the Secretary of the Interior for over a half century, and agreements requiring that preference in Reservation employment be given to qualified Navajo applicants number well into the hundreds. Such lease provisions are a primary, bargained-for consideration on the part of the Navajo Nation.

The District Court granted Peabody's motion to dismiss, principally because the Navajo Nation is an indispensable party under Fed. R. Civ. P. 19 that the EEOC cannot join under Title VII of the Civil Rights Act of 1964 or otherwise. *EEOC*, 214 F.R.D. at 557-59. The Court of Appeals reversed, holding that the EEOC could join the Navajo Nation under Rule 19, notwithstanding the

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[1] No person other than amicus and its counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

EEOC's inability to sue the Navajo Nation directly because of Navajo sovereign immunity and the conceded prohibition placed by Congress on the EEOC's authority to proceed in cases involving governments under Title VII. *EEOC v. Peabody Coal Co.*, 400 F.3d 774 (9th Cir. 2005). Subsequent to the Ninth Circuit's ruling, Peabody formally notified the Navajo Nation that it intended to bring a cross-claim against the Navajo Nation seeking, in effect, to void employment preference provisions in the lease and to invalidate the Navajo Preference in Employment Act, 15 N.N.C. §§ 601-19 (1995), which has governed employment practices on the Reservation since 1985.

The Ninth Circuit's ruling constitutes an unauthorized abrogation of Navajo sovereign immunity and contravenes Congress' careful allocation of power between the EEOC and the Attorney General. The Navajo Nation faces an infrastructure deficit of over $3.7 billion compared with similar adjacent rural areas. *See* United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* 41 (1975). The unemployment rate on the Reservation is 42%. The Navajo Nation cannot afford to spend scarce resources to defend litigation brought by one arm of the federal government challenging the terms of leases drafted and approved by another arm of the federal government, the Department of the Interior, which has primary responsibility for the fulfilment of the federal trust relationship, *see Nevada v. United States*, 463 U.S. 110, 135 n.15 (1983).

The Ninth Circuit's Rule 19 ruling implicates fundamental aspects of Navajo sovereignty, the relationship between the Navajo Nation and the United States under treaties and federal statutes, and the sanctity of federally approved leases of Navajo land. Peabody understandably has not focused on these interests. The accompanying brief

of the Navajo Nation does, so that the Court may evaluate the Petition with reference to all of the significant issues.

ARGUMENT

I. IMPORTANT FEDERAL AND TRIBAL INTERESTS ARE AT STAKE.

The Ninth Circuit's decision threatens important tribal and federal interests. First, as the Petition persuasively shows, Congress carefully reserved to the Attorney General the discretion to proceed in Title VII cases involving governments, and the Ninth Circuit's decision upsets that delicate balance. Other significant federal and tribal interests are implicated because the judicial abrogation of Navajo sovereign immunity by the Ninth Circuit was in service of the goal of the EEOC to "not only seek to void or rework the Navajo Nation's Coal Leases, but also to seek to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act." *EEOC*, 214 F.R.D. at 561. The decision below therefore undermines the Navajo Nation's right to be free from unconsented-to lawsuits, and threatens the fundamental rights of the Navajo Nation, implemented in close cooperation with the Department of the Interior, to exclude or condition the entry of nonmembers seeking to do business in the tribal territory, to oversee economic activity on the Reservation, and to set labor policy for the training and employment of tribal members. These are important federal and tribal interests. *See Williams v. Lee*, 358 U.S. 217, 221, 223 (1959) (Treaty with the Navajo "provided that no one, except United States Government personnel, was to enter the reserved area"; cases of the Court "have consistently guarded the authority of Indian governments over their reservations.

Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 (1987) (tribal self-sufficiency and economic development are "important federal interests"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978) (abrogation of tribal sovereign immunity by implication is "inconsistent with the congressional goal of protecting tribal self-government"); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002) (*en banc*) (enactment of tribal law that requiring, *inter alia*, preferential hiring to tribal members is "clearly an exercise of sovereign authority over economic transactions on the reservation").

Two treaties form the foundation of the federal/Navajo relationship. *See United States v. Wheeler*, 435 U.S. 313, 324 n.20 (1978). In the first, the Navajo Tribe submitted to the Government's "sole and exclusive right of regulating the trade and intercourse" with the Navajo, and the United States promised in return to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo people. Treaty with the Navaho, Art. III, XI, 9 Stat. 974-75 (1850). The second, ratified in 1868, guaranteed the fundamental right of the Navajo Tribe to exclude nonmembers from entering the Reservation. *Williams v. Lee*, 358 U.S. at 221. This right necessarily includes the lesser right of conditioning the entry of nonmembers seeking to do business in the tribal territory. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982).

Congress has legislated to implement the Treaties and to protect these fundamental interests. Although the Navajo Nation is now the country's largest Indian nation, with territory covering over 25,000 square miles, the Navajo people have experienced poverty not found elsewhere in the

United States. Having defaulted on its treaty commitment to provide schools for the Navajo,[2] the Government found in 1948 that the median education level of Navajos was less than one year, that 80% of Navajos were illiterate and 65% spoke no English. Conference Rep. No. 1892, 81st Cong., 2d Sess. (1950), reproduced at 1950 U.S. Code Cong., and Adm. News 2013, 2014. The shocking economic conditions on the Reservation motivated Congress to pass the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-38. That legislation "represent[ed] a new approach in the field of Indian affairs. For the first time, there [was] placed before the Congress in one bill a composite statement of the needs of the Indians in a specific area. Up to [then], the needs of the Indians ha[d] been presented by function, such as education and health, on a Nation-wide basis, rather than by area." H.R. Rep. No. 963, 81st Cong., 1st Sess. 2 (1949); S. Rep. No. 550, 81st Cong., 1st Sess. 3 (1949) (reproducing Statement of Secretary of the Interior Krug). The Rehabilitation Act specifically authorizes Navajo-specific employment preferences. 25 U.S.C. § 633. Portions of the Rehabilitation Act have been amended or repealed by Congress on four occasions, including twice after the passage of Title VII in 1964, *see* notes following 25 U.S.C.A. §§ 639, 640, but Congress has left intact the section permitting tribal-specific employment preferences.

The Rehabilitation Act initially focused on federal construction of roads and schools. *See* 25 U.S.C. § 631. But

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[2] *See* 26 Cong. Rec. 7703 (1894). Discrimination by state school districts exacerbated the problem. *See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 (1982) (referring to the Navajo school "children abandoned by the State"); *Natonabah v. Board of Educ.*, 355 F. Supp. 716, 719 (D.N.M. 1973).

as predicted, the initial expenditures authorized in the Rehabilitation Act did "not complete the job," *see* S. Rep. No. 550 at 7 (reproducing Statement of Assistant Secretary of the Interior Warne), and the Navajo Nation complemented the Treaties and the Rehabilitation Act with legislation of its own. In 1970, the Navajo Tribal Council enacted legislation effectuating the Navajo Nation's power to exclude and "to promote the further economic development of the Navajo People." *See* 5 N.N.C. § 401 (1995). In that law, the Council expressly retained the Navajo Nation's power to grant, deny, continue or withdraw the privilege of doing business on the Navajo Reservation. *Id.* That privilege was conditioned on "the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases . . . authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation." *Id.* § 403. Those federally approved leases – now numbering over five hundred – require the lessees to grant preference in employment to qualified Navajo applicants.

In 1985 the Navajo Tribal Council passed the Navajo Preference in Employment Act ("NPEA"), 15 N.N.C. §§ 601-19 (1995), implementing as a matter of tribal law the employment preference provisions of the Rehabilitation Act. That law generally imposes an affirmative action obligation on employers and requires employers to hire Navajo applicants who "demonstrate[] the necessary qualifications for an employment position." 15 N.N.C. § 604(B), (C)(1). Nonetheless, unemployment of Navajos on their own Reservation is still 42%. The EEOC is apparently unconcerned, and the Ninth Circuit's decision imperils the continued effectiveness of several hundred commercial leases and rights-of-way approved or granted

by the United States. The employment preference provision in all of these leases is "a right the Tribe contracted for its members" and constitutes valuable consideration for the lease rights granted. *Yazzie v. Morton*, 59 F.R.D. 377, 382 (D. Az. 1973); *see generally MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 975-78 (D. Ut. 2005) (discussing the NPEA and concluding that its provisions "reflect the obvious exercise of the Navajo Nation's acknowledged power to 'make their own laws and be ruled by them,' *Williams v. Lee*, even with respect to relationships with non-Navajo employers").

Finally, the ruling of the Ninth Circuit directly implicates the sovereign immunity of the Navajo Nation. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).[3] This Court has consistently rejected attempts to circumvent tribal sovereign immunity through manipulation of the Rules of Civil Procedure or other means. For example, the Court in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-14 (1940), rejected an attempt to sue two tribes "whether directly or by cross-action" even though complete relief was unavailable in the tribes' absence, and rejected the attempt to obtain relief against the tribes by suing federal officials. In so holding, the Court analogized the tribes' sovereign immunity to that of

[3] This Court invited Congress to consider the doctrine of tribal sovereign immunity in *Kiowa*. 523 U.S. at 759-60. Congress did so in 2000, amending the 1870 law that governs all contracts and agreements with Indian tribes to require generally that such contracts include provisions for remedies and either a straightforward assertion of sovereign immunity or waiver of that immunity. *See* 25 U.S.C. § 81.

the United States as dominant sovereign, and relied on *United States v. Shaw*, 309 U.S. 495 (1940), in ruling that cross-suits against the tribes could be maintained only in those courts where Congress had consented to their consideration. *See also United States v. Sherwood*, 312 U.S. 584, 589-91 (1941) (rejecting as inconsistent with the Rules Enabling Act an attempt to circumvent the Government's sovereign immunity through joinder under the Federal Rules of Civil Procedure). In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991), the Court held that tribal sovereign immunity could not be defeated through the assertion of a compulsory counterclaim under Rule 13. Similarly, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978), the Court rejected an attempt to circumvent tribal sovereign immunity by suing tribal officers, ruling that a clear statement by Congress of its intention to permit such intrusions into tribal affairs was needed to sustain such action.

Such a clear statement rule is appropriate in part because of the high cost of civil litigation in federal district courts and the limited resources of most tribes. *Martinez*, 436 U.S. at 64-65 & n.19; *see generally* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1073 & nn.91-92 (1982). More generally, the clear statement requirement honors the allocation of federal power in Article I, § 8 of the Constitution, with important structural and practical benefits. *See* Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 428 (1993). By contrast, the "incremental invasions" into tribal sovereign immunity countenanced by the Ninth Circuit in this case "are an intrusion not only on the

tribes, but on Congress as well," because of Congress' exclusive power over commerce with the Indian nations. *See In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. at 1072 & n.83, *citing Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

The EEOC candidly informed the District Court that it needs to evade the Navajo Nation's sovereign immunity in order to defeat fundamental federal and tribal interests. *EEOC*, 214 F.R.D. at 561 ("In fact, the EEOC has indicated that it intends not only to seek to void or rework the Navajo Nation's Coal Leases, but also to seek to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act."). The Ninth Circuit's ruling glosses over those important interests, dismisses express restrictions in Title VII that limit the EEOC's power to act in cases involving governments, and uses Rule 19 to defeat substantive rights of the Navajo Nation in violation of the Rules Enabling Act and Rule 82. The Navajo Nation respectfully urges the Court to grant the Petition and correct the error below.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS IN OTHER CIRCUITS, AND APPLIES RULE 19 TO EFFECT A JUDICIAL ABROGATION OF NAVAJO SOVEREIGN IMMUNITY IN CONTRAVENTION OF TITLE VII ITSELF AND IN VIOLATION OF THE RULES ENABLING ACT AND RULE 82.

The Petition identifies cases decided in other circuits conflicting with the decision below, and the Navajo Nation will not repeat that discussion here. The conflict among

the lower courts is a sufficient basis for granting the Petition.

In addition, the decision below applies Rule 19 in a manner that improperly contravenes express exceptions and limitations of Title VII itself, abrogates Navajo Nation sovereign immunity without Congressional sanction, and violates the Rules Enabling Act and Rule 82.

A. Title VII Did Not Abrogate Tribal Sovereign Immunity or Treaty Provisions, and It Preserved Preexisting Employment Preferences in Indian Country.

Two sections of Title VII relate to Indian tribes and on-reservation employment. First, in the definition section, any "Indian tribe" is excluded from the definition of an "employer." 42 U.S.C. §2001e(b)(1). Second, Congress exempted from Title VII's coverage "any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." *Id.* § 2000e-2(i). More generally, Title VII carefully restricted the ability of the EEOC to act in cases "involving a government, governmental agency, or political subdivision." *See id.* § 2005e-5(f)(1) (providing for notification to aggrieved parties and the filing of civil actions by "the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision"). Filing an action in such cases is reserved to the Attorney General. *See id.* ("In the case of a respondent which is a government, governmental agency, or political subdivision, . . . the Commission shall take no further action and shall

refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.").

Both of the Indian provisions were authored by Senator Mundt. *See* 110 Cong. Rec. Sen. 13,702 (1964). In explaining these provisions, Senator Mundt stated that they "would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill." *Id.*; *see Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 375 (10th Cir. 1986). Senator Mundt concluded by stating that the provisions "will assure our American Indians of the continued right to protect and promote their own interests and *to benefit from Indian preference provisions now in operation or later to be instituted.*" 110 Cong. Rec. Sen. 13,702 (1964) (emphasis added). Senator Humphrey immediately expressed his own comfort with the provisions, because "[a]ny economic activity on the part of the Indian tribes must have the approval of the Secretary of the Interior."[6] *Id.* Clearly, the 1950 Rehabilitation Act was one of the "Indian preference provisions now in operation," and each Secretary of the Interior for over a half-century has included Navajo preference provisions in leases of and rights-of-way over Navajo land.

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[6] Senator Humphrey had introduced the series of amendments that included the one exempting Indian preference programs with the following justification: "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. Sen. 12,723 (1964).

Nowhere in Title VII is there any congressional provision abrogating tribal sovereign immunity. As this Court has observed, Congress is quite capable of providing for suits against Indian nations when it deems appropriate. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758-59 (1998). A "proper respect for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent" to abrogate tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Similarly, "Indian treaty rights are too fundamental to be easily cast aside," *United States v. Dion*, 476 U.S. 734, 739 (1986); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999), and Title VII evidences no clear legislative intent to abrogate the fundamental right of the Navajo Nation to condition the entry of nonmembers seeking to do business within the Navajo Reservation.

By contrast, the EEOC seeks (and obtained from the Ninth Circuit) a judicial abrogation of Navajo sovereign immunity which would diminish the fundamental rights of the Navajo Nation as sovereign and landowner, including the Navajo Nation's treaty right to exclude or condition the entry of those seeking to do business on Navajo lands. The Ninth Circuit merely glanced at those tribal interests and at the relief actually sought by the EEOC against the Navajo Nation. Its decision that the suit could be maintained against the Navajo Nation as a "Rule 19 defendant" or otherwise is contrary to settled precedents of this Court.

B. The Ninth Circuit's Ruling Violates the Rules Enabling Act and Rule 82.

The decision below relies entirely on Rule 19 as the vehicle to allow suit against the Navajo Nation by the EEOC. Such use of Rule 19 violates the Rules Enabling Act and Rule 82. When Congress authorized the Supreme Court to prescribe rules of procedure for the district courts, it provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rule 82 complements that admonition, stating that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ." Fed R. Civ. P. 82. *See Lincoln Property Co. v. Roche*, No. 04-712, 2005 WL 3158018, at *6 (U.S. Nov. 29, 2005) (Rule 19 "address[es] party joinder, not federal-court subject-matter jurisdiction," citing Rule 82).

Federal or tribal sovereign immunity is a "substantive right" that is protected under the Rules Enabling Act. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 589 (1940); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991); *see generally Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765, 773-74 (D.C. Cir. 1986) ("An Indian tribe's immunity is co-extensive with the United States' immunity. . . ."), citing, *inter alia United States Fidelity & Guaranty*. The sovereign immunity of the United States or an Indian tribe is jurisdictional. *Sherwood*, 312 U.S. at 586-87; *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 172-73 (1977); *Martinez*, 436 U.S. at 58; *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509; *United States Fidelity & Guaranty*, 309 U.S. at 512.

The decision below permits suit against the Navajo Nation through the innovative use of Rule 19, where plaintiff EEOC avowedly seeks to void or modify Navajo leases and to prohibit the Navajo Nation from exercising its fundamental treaty right to exclude or condition the entry of nonmembers seeking to do business on Navajo land. Such use of Rule 19 violates the Rules Enabling Act because it abridges the Navajo Nation's sovereign immunity, and it violates Rule 82 by expanding the jurisdiction of the district court to entertain a suit against the Navajo Nation notwithstanding tribal sovereign immunity left intact by Congress.

This is not to say that Congress cannot abrogate tribal sovereign immunity or provide for third-party joinder of Indian tribes or other sovereigns, such as states. *See generally Kiowa*, 523 U.S. at 759 ("Congress, subject to constitutional limitations, can alter [the] limits [of tribal immunity] through explicit legislation."). Congress not only knows how to limit the sovereign immunity of other sovereigns when it wants to, *Kiowa*, 523 U.S. at 758-59, but it also knows how to permit joinder of sovereigns under Rule 19 when it deems appropriate. *See Orff v. United States*, 545 U.S. ___, 125 S. Ct. 2606 (2005) (construing 43 U.S.C. § 390uu, which provides that "[c]onsent is given to join the United States as a necessary party defendant in any suit to adjudicate . . . the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law"). But even in cases where such consent or joinder is permitted, that consent must be strictly construed in favor of the sovereign entity. *See, e.g., United States v. Mottaz*, 476 U.S. 834, 845-46 (1986) (construing 25 U.S.C. § 345);

United States Fidelity & Guaranty, 309 U.S. at 512-13; *Orff*, 125 S. Ct. at 2609-11.

Congress granted no consent to sue an Indian tribe to void its leases or invalidate its laws. The use of Rule 19 to defeat Navajo sovereign immunity and to diminish treaty-based rights contravenes the Rules Enabling Act and Rule 82.

C. Even if Congress Had Permitted Suits Against Indian Tribes in Title VII, It Expressly Withheld that Power from the EEOC.

As shown above and as the Petition amply demonstrates, Congress empowered the EEOC to bring civil actions against employers, but withheld the power to proceed in any case "involving" a government or a government agency. In such cases, Congress required that the matter be referred to the Attorney General.

This case "involves" in significant ways not only the Navajo Nation, but also one other government agency, the United States Department of the Interior. The Department is the focal point of the Government's trust relationship with the Navajo Nation and other Indian tribes. *Nevada v. United States*, 463 U.S. 110, 135 n.15 (1983). As trustee it has drafted and/or approved several hundred leases of, and rights-of-way over, Navajo Nation trust lands. These contracts involve energy production and transmission and other commerce vital to the Navajo Nation and to the United States as a whole. Under federal law, cancellation of a lease or invalidation of a lease term requires the

participation of the Department. *See* 25 C.F.R. § 211.54 (mineral leases); 61 Fed. Reg. 35,634, 35,650 (1996) (promulgating same, explaining "[t]he request for tribal authority to cancel leases is not included in final regulations. The mineral lease approved by the Secretary concerns lands which the Department has a statutory duty to protect. . . . [T]he final decision to cancel must remain with the Secretary."); *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983).

Thus, a challenge to a term of a mineral lease such as Peabody's here "may involve the Tribe, the Secretary [of the Interior and] the lessee-power companies in numerous legal disputes and causes of action." *Yazzie v. Morton*, 59 F.R.D. 377, 382 (D. Az. 1973). The EEOC did not even consult with the Navajo Nation prior to filing the suit against Peabody, and we understand that it did not consult the Department of the Interior, either.

In a case where such significant interests of the Navajo Nation and federal agencies are involved, the Attorney General would be the appropriate official to consider the matter before proceeding. In contrast to the single focus of the EEOC, the Department of Justice has broad responsibilities regarding, and a greater sensitivity to, larger tribal and federal interests. *See, e.g.*, 61 Fed. Reg. 29,424 (1996) (establishing the Office of Tribal Justice within the United States Department of Justice, and publishing the "Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes"); 25 U.S.C. § 175 (providing that the Justice Department shall represent Indians in all suits at

law and in equity); *see generally*, 28 U.S.C. § 519 (Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party).

Thus, even if Congress had decided to abrogate tribal sovereign immunity in Title VII, any case involving tribal interests in leases approved by the Department of the Interior would have to be handled by the Attorney General, not the EEOC, since Congress expressly withheld authority from the EEOC to proceed in any matter involving a government or government agency.

CONCLUSION

"No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *United States ex rel. Hall v. Tribal Devel. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) (citing numerous authorities) (internal quotation marks omitted). Congress has not consented to suit against the Navajo Nation in a case brought to invalidate the terms of leases approved by and, as here, drafted by, the Department of the Interior or to invalidate Navajo Nation laws governing on-reservation economic activity.

Allowing the EEOC to join the Navajo Nation as a "Rule 19 defendant" modifies the substantive rights of both the EEOC and the Navajo Nation, and extends the jurisdiction of the district court in violation of the Rules Enabling Act and Rule 82. And Congress specifically withheld from the EEOC the ability to bring suit in cases "involving" a government or government agency. Only the

Attorney General may pursue such actions under Title VII.

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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December 19, 2005

TITLE 5
NAVAJO NATION CODE

§ 401. Privilege of doing business – Authority to grant, deny or withdraw

The Navajo Nation Council, in order to promote the further economic development of the Navajo People, and in order to clearly establish and exercise the Navajo Nation's authority to regulate the conduct and operations of business within the Navajo Nation, hereby declares that the Navajo Nation has the sole and exclusive authority to grant, deny, or withdraw the privilege of doing business within the Navajo Nation, except where such authority is withdrawn from the Navajo Nation by the Constitution and applicable laws of the United States

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§ 402. Businesses presently operating within the Navajo Nation

The privilege of doing business is hereby expressly granted to those businesses presently operating within the Navajo Nation pursuant to leases or permits for the use of land, or pursuant to contractual agreements with the Navajo Nation, its enterprises, and agencies subject to the control or supervision of the Navajo Nation Council or the Economic Development Committee, or with the lessees of the Navajo Nation.

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§ 403. Conditions for continuation

The grant of the privilege of doing business within the Navajo Nation contained in 5 NNC §402 is conditioned upon the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases, permits, or contracts authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation.

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§ 404. Revocation; modification or alteration of privilege

The Navajo Nation Council reserves the right to revoke this grant of the privilege of doing business within the Navajo Nation; to modify, limit or otherwise alter the extent of this grant; and to establish and enact such laws relating to the establishment or conduct of business within the Navajo Nation as it may deem desirable.

TITLE 15
NAVAJO NATION CODE

SECTION

601. Title
602. Purpose
603. Definitions
604. Navajo employment preference
605. Reports
606. Union and employment agency activities; rights of Navajo workers
607. Navajo Prevailing wage
608. Health and safety of Navajo workers
609. Contract compliance
610. Monitoring and enforcement
611. Hearings
612. Remedies and sanctions
613. Appeal and stay of execution
614. Non-Navajo spouses
615. Polygraph test
616. Rules and regulations
617. Prior inconsistent law repealed
618. Effective date and amendment of the Act
619. Severability of the Act

§ 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

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§ 602. Purpose

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;

2. To provide training for the Navajo People;

3. To promote the economic development of the Navajo Nation;

4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;

5. To foster the economic self-sufficiency of Navajo families;

6. To protect the health, safety, and welfare of Navajo workers; and

7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.

B. It is the intention of the Navajo Nation Council that the provisions of this act be construed and applied to accomplish the purposes set forth above.

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§ 603. Definitions

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 NNC §254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the sole purpose of co-counseling in association with a person described in clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform

essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

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§ 604. Navajo employment preference

A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this §604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the

Act. In the event of a required joint plan by an employer and associated labor organization, only the non-complying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omissions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act,

provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and *bona fide* seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

* * *

No. 05-353

Supreme Court, U.S.
FILED
DEC 16 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PEABODY WESTERN COAL CO.
and PEABODY COAL COMPANY, LLC,

Petitioners,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF NEW MEXICO AND *AMICI CURIAE* STATES OF ARIZONA, COLORADO, MONTANA, OKLAHOMA, OREGON AND UTAH IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE* STATE OF NEW MEXICO

Patricia A. Madrid, Attorney General of the State of New Mexico, submits the following statement, which reflects the interest of the State of New Mexico in supporting the Petitioners' Petition for Writ of Certiorari, seeking to reverse the decision of the Ninth Circuit Court of Appeals. This decision, which empowers the Equal Employment Opportunity Commission ("EEOC") in a way expressly prohibited by Congress, threatens the sovereignty of the Navajo Nation and of the State of New Mexico and places in jeopardy the delicate balance of power that Congress has established between the United States Government and the governments of the Navajo Nation, other Indian Tribes and the States. If allowed to stand, that decision would permit the EEOC to usurp the authority established by law of the United States Attorney General and to arrogate unto itself the discretion and judgment lawfully confined to the United States Attorney General, to the detriment of the Navajo Nation and of the State of New Mexico.

The Navajo Nation is the largest reservation in the United States, comprising over 27,000 square miles within the states of Arizona, New Mexico, and Utah. According to the 2000 census, the Navajo population within the State of New Mexico is 106,807. The Navajo Nation suffers from 42% unemployment and endures a below-poverty rate of 43%. Revenue sources include 51% from mining.[1] Quite clearly, the Navajo Nation's economic interests and the

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[1] The source of this information may be found at www.navajobusiness.com and related links.

well being of its members are of great importance and concern, not only to the Navajo Nation but also to the State of New Mexico.

The EEOC, in this litigation, challenges the lawful authority of the Navajo Nation to require, contractually, adherence to Navajo employment preferences. The Navajo Nation has enacted the Navajo Preference in Employment Act ("NPEA"), 15 N.N.C. §§ 601-619. Congress has expressly denied the EEOC the authority to litigate against a government, in this case, the Navajo Nation. Instead, under Congress' law, only the United States Attorney General may litigate against a government, such as the Navajo Nation. The purpose of NPEA is, among others, to provide employment opportunities, to provide training to the Navajo People, to promote economic development and to protect the health, safety and welfare of Navajo workers. 15 N.N.C. § 602. The Navajo Nation's economic interests and it sovereign governmental interests thus are at stake in this case.

The same law that denies the EEOC the authority to litigate against the Navajo Nation, 42 U.S.C. § 2000e-5(f)(1), also denies the EEOC the authority to litigate against the individual States. However, the Ninth Circuit Court of Appeals, whose decision is at issue here, has allowed the EEOC to skirt that Congressional withdrawal of authority by allowing the EEOC to employ the device of joinder under Rule 19 of the Federal Rules of Civil Procedure. Using this device permitted by the Ninth Circuit Court of Appeals in its decision, the EEOC will join the Navajo Nation as party defendant to the EEOC's suit against Petitioner. Allowing the EEOC to circumvent Congressional will in this manner, by employing a joinder device, imperils the sovereign governmental interests of

the Navajo Nation, as well as the sovereign governmental interests of the State of New Mexico because the court's ruling has application to all the individual States, including the State of New Mexico.

New Mexico, acting by and though her Attorney General, is interested in preserving and protecting the governmental interests and economic well being of all her people from the usurpation of authority that contravenes settled Congressional law and policy.

The joining States, while not necessarily sharing, to the same degree, the privileges and obligations of representing Native People, respect the sovereignty those Nations and Tribes enjoy, and voice their disagreement, as well, with the result reached by the Ninth Circuit Court of Appeals in this case. That result also threatens the sovereignty of the States and most importantly eviscerates Congress' express delegation to the United States Attorney General of the sole authority to determine when and under what circumstances litigation will be undertaken by the United States government against a governmental entity, including the States.

ARGUMENT

I. 42 U.S.C. § 2000e-5(f)(1) prohibits suit by the EEOC against a governmental entity. Allowing the EEOC to join a governmental entity, in this case, the Navajo Nation, under Fed. R. Civ. P. 19 contravenes this prohibition.

A. The plain language of 42 U.S.C. § 2000e-5(f)(1) prohibits suit by the EEOC against a governmental entity, whether by joinder under Rule 19 or otherwise.

"Congress 'says in a statute what it means and means in a statute what is says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). *See also U.S. v. Great Northern*, 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written"). In the case at bar, Congress has plainly written in its laws that the EEOC cannot litigate against the Navajo Nation or any other government. 42 U.S.C. § 2000e-5(f)(1) provides that if the EEOC is unable to secure an acceptable conciliation agreement from a governmental entity, then the EEOC "*shall take no further action* and *shall refer the case to the Attorney General* who may bring a civil action." (Emphasis added). The device of joinder under Rule 19 of a government, if allowed to be used by the EEOC, would illegally circumvent and evade the express directive of Congress, thus disrespecting and disavowing the considered Congressional policy choices and legitimate policy underpinnings to the express prohibition with respect to the EEOC's authority.

In the case at bar, the EEOC alleges that Petitioner[2] has violated the prohibitions of Title VII of the Civil Rights Act of 1964 against discrimination by giving preference in hiring to Navajos over non-Navajo Native Americans in its coal mining operations on the Navajo and Hopi reservations in northeastern Arizona. Petitioner has mined coal on the reservations since 1964 pursuant to leases with the Navajo Nation. Those leases contain a Navajo hiring preference provision, which obliges lessee Petitioner to give preference in hiring to Navajos. One lease, entered into in 1966, allows the lessee Petitioner to extend the Navajo employment preference to Hopi Indians.[3]

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[2] In its petition for writ of certiorari, at footnote 1, Petitioner states that because the real party in interest is Petitioner Peabody Western Coal Company, the singular term "Petitioner" is used in the petition.

[3] *See* Article XVII of the 1966 lease entitled "Employment Preference":

> Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.
>
> Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

Pet. App. 28a.

The 1961 Navajo Permit and the 1964 Navajo Coal Lease contain, as well, Navajo employment preference requirements. Pet. App. 21a-24a. The 1964 Joint Use Permit contained an employment preference for the Navajo and Hopi. Before execution, however, a dispute arose resulting in separate mining leases. The Hopi lease contained a preference for Hopi, which the tribe could extend to Navajo. The Navajo lease contained the Navajo preference, which lessee could extend to Hopi. Pet. App. 24a-28a.

Pursuant to the Indian Mineral Leasing Act of 1938, the Secretary of the Department of Interior has approved the leases. If the lease terms are violated, the Navajo Nation and the Secretary of the Interior have the right to declare the lease null and void.[4] According to Petitioner's general counsel from 1968 to 1985, "It is my understanding that the United States Secretary of the Interior required these [Navajo] employment preference provisions as a condition of the leases, as part of a standardized practice by the Secretary of the Interior at the time."[5]

These lease provisions with the Navajo Nation that require Navajo employment preference are consistent with the Navajo Preference in Employment Act ("NPEA"), which provides that: "All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall . . . [g]ive preference in employment to Navajos . . . " 15 N.N.C. § 604.[6]

The Navajo Supreme Court emphasized the importance of NPEA to Navajo governance in *Manygoats v. Atkinson Trading Co., Inc.*, No. SC-CV-62-2000 (Navajo 08/12/2003): "We take judicial notice of the fact that Navajo Nation unemployment rates are very high. The Navajo Nation enacted the NPEA to ensure the economic growth of the Nation and the economic well being of the Navajo workforce." *Id.* ¶ 45.[7]

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[4] *See* the district court's order. Pet. App. 28a.

[5] *See* the district court's order. Pet. App. 29a-30a.

[6] *See* the district court's order. Pet. App. 30a.

[7] *Manygoats v. Atkinson Trading Co., Inc.* may be found at www.tribal-institute.org/opinions/2003.NANN.0000016.htm

Congress expressly exempts Indian tribes from the definition of employer under Title VII and indicates that tribal preference programs cannot serve as the basis for Title VII race discrimination claims. *See* 42 U.S.C. § 2000e(b) and § 2000e-2(i).[8] *See Taylor v. Alabama Inter-tribal Council Title IV*, 261 F.3d 1032, 1035 (11th Cir.), *cert. denied*, 535 U.S. 1066 (2002) (refusing to allow circumvention of Title VII's bar against race discrimination claims based on a tribe's employment preference by styling it a § 1981 claim); *Yashenko v. Harrah's NC Casino Co., LLC*, 352 F. Supp.2d 653, 663 (W.D. N.C. 2005) (in the context of specific tribal preferences applied by defendant company having a management agreement with the Cherokee: "[I]t would be contrary to Congress' expressed will to allow a plaintiff to circumvent the express provisions of Title VII and assert an employment discrimination claim against an Indian tribe or private business on an Indian reservation for the use of tribal preferences merely by reconfiguring the claim as one for relief under § 1981 instead of Title VII").

As described by the district court with respect to the case at bar, the EEOC seeks in effect to enjoin enforcement of the Navajo employment preference provisions agreed to by the Navajo Nation and Petitioner and approved by the Department of the Interior. The EEOC specifically requests in its complaint that the court

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[8] 42 U.S.C. § 2000e(b) provides, in part that for purposes of Title VII, "[t]he term 'employer' . . . does not include (1) an Indian tribe." 42 U.S.C. § 2000e-2(i) exempts from Title VII "any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation."

"[g]rant a permanent injunction enjoining Peabody . . . and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin."[9] The EEOC has indicated that it intends not only to seek to void or rework the Navajo Nation's coal leases, but also to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act.[10] The EEOC describes "the central issue in the case" as "whether the Navajo Nation can discriminate against non-Navajo Native Americans," although its position appears to be in direct contradiction to the position taken by the United States Department of the Interior through its approval of the leases containing the Navajo Employment Preference provisions at issue in this case.[11]

The district court dismissed the EEOC's case, concluding that the Navajo Nation was a necessary and indispensable party to the litigation, which could not be made a party to this litigation by the EEOC under the specific provision of Title VII, 42 U.S.C. § 2000e-5(f)(1) (prohibiting the EEOC from filing an action against a "government").[12] The Ninth Circuit Court of Appeals reversed, concluding that, because no relief against the Navajo Nation had formally been sought, Rule 19 of the Federal Rules of Civil Procedure allowed joinder of the Navajo Nation. In the opinion of the court, Rule 19's purpose was satisfied, because "by definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair

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[9] *See* the district court's order. Pet. App. 43a.

[10] *See Id.*

[11] *See* the district court's order. Pet. App. 44a.

[12] *See* the district court's order. Pet. App. 41a.

the effectiveness of relief or their own or present parties' ability to protect their interest."[15] The Ninth Circuit Court of Appeals also opined that joinder was necessary in order to ensure that "both Peabody and the Nation are bound to any judgment upholding or striking down the challenged lease provision."[16]

It strains credulity to assert that "relief is not sought" by the EEOC against the Navajo Nation. Moreover, becoming "bound" by a judgment, for a governmental entity, such as the Navajo Nation or a State, is a long, expensive, arduous, and worrisome road, and being "bound" clearly can have coercive consequences if adverse. Most importantly, the fact remains that the Navajo Nation, a government, is now, under the appellate court's decision, a defendant in a suit brought by the EEOC and will be required to defend in court its Navajo employment preference law and contractual provisions in response to a suit brought by the EEOC. But the EEOC is expressly without lawful power to institute and maintain such suit against the Navajo Nation.

42 U.S.C. § 2000e-5(f) provides, in part: "(1) . . . In the case of a respondent which is a government, governmental agency or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement . . . the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate

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[15] *See* the Ninth Circuit appellate court's opinion, quoting *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F. Supp. 506 (N.D. Cal. 1977). Pet. App. 15a.

[16] *See* Pet. App. 14a.

United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. . . ."[15] The EEOC does not dispute that the Navajo Nation is a "government, governmental agency or political subdivision" for purposes of 42 U.S.C. § 2000e-5(f)(1). *See* Pet. App. 35a.

Consistently, 29 C.F.R. § 1601.29 provides, in part: "If the Commission is unable to obtain voluntary compliance in a charge involving a government, governmental agency or political subdivision, it shall inform the Attorney General of the appropriate facts in the case with the recommendations for the institution of a civil action. . . ."[16]

This exclusive role of the Attorney General in cases where governmental entities are involved reflects

> Congress' special concern that a federal administrative agency [the EEOC] could possibly issue orders directly to a non-federal governmental unit. Congress sought to reduce 'the possibility of friction that might be created by a Federal Executive

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[15] *See also* 42 U.S.C. § 2000e-5(f)(2), which provides, in part: "Whenever . . . prompt judicial action is necessary . . . the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief. . . ."

[16] *See also* 29 C.F.R. § 1601.27, which provides, in part: "The Commission may bring a civil action against any respondent named in a charge not a government, governmental agency or political subdivision. . . ."; 29 C.F.R. § 1601.23(b), which provides, in part: "In a case involving a government, governmental agency, or political subdivision, any recommendation for preliminary or temporary relief shall be transmitted directly to the Attorney General. . . ."

> agency issuing administrative orders to sovereign states and their subdivisions.' 118 Cong. Rec. at 1170 (January 25, 1972). Congress responded to this concern by requiring that the Attorney General, rather than the EEOC, file civil actions . . . where the respondent was a government, governmental agency or political subdivision. *See* 1972 U.S. Code Cong. & Adm. News, p. 2182.

Minor v. Northville Public Schools, 605 F. Supp. 1185, 1191 (E.D. Mich. 1985). *See also U.S. Equal Employment Opportunity Comm'n v. Illinois State Tollway Authority*, 800 F.2d 656, 659 (7th Cir. 1986) (upholding EEOC's authority to issue subpoenas as not in conflict with the Attorney General's sole responsibility to litigate cases against governmental entities; observing that one Congressional objective to relegating sole responsibility to the Attorney General was that "by placing a cabinet-level head behind the lawsuit, Title VII enforcement would be more effective and [would] reduce friction between State and Federal governmental agencies." Moreover, explained the court:

> Congress uses the term 'civil action' in specific reference to a lawsuit in order to enforce Title VII, *i.e.* bringing a suit on the merits. To allow the EEOC the power of subpoena enforcement will not in any way hinder the Attorney General's authority and discretion in suing state and local governments for violations of Title VII.

Id. at 660.

Considering a Rule 19 joinder issue in light of the Attorney General's exclusive authority contained in 42 U.S.C. § 2000e-5(f)(1), the court, in *Equal Employment*

Opportunity Comm'n v. Elgin Teachers Assn, 658 F. Supp. 624 (N.D. Ill. 1987), focused the Rule 19 joinder issue in this manner: "[W]hether, because the statute precludes such joinder of the Board [of Education of the District] in this EEOC-initiated lawsuit (a classic example of joinder not being 'feasible,' as the caption of Rule 19(b) puts it), the action should be dismissed." *Id.* at 625. The court allowed the action to proceed in the Board's absence. In contrast to the case at bar, the EEOC's injunctive action there, which was based on a collective bargaining agreement that was later changed to eliminate the offending provision, was moot. Thus, no relief of any sort was expressly or necessarily sought by the EEOC against the governmental entity, the board. The only viable claim for relief was for damages, for which the defendant Association could be held solely liable. Thus, in that case, there existed no reason to join the Board. The EEOC sought no order of any sort against the Board. The Association's desire to share with the Board the monetary burden, the court found inadequate to defeat the plaintiff's entitlement to money damages.

Declining to allow the EEOC to "ferry-boat in" a governmental entity school district as an indispensable party to the EEOC's action against a teachers' union, the court, in *Equal Employment Opportunity Comm'n v. Oak Park Teachers' Ass'n*, 45 Fair Empl. Prac. Cases 444, 1985 WL 5220 (N.D. Ill. 1985), stated:

> Congress made a conscious decision to have any action against a governmental body initiated by the Attorney General, not EEOC. The Attorney General could have proceeded against both the [School] Board and OPTA [teachers' union] (the statute does not prohibit the Attorney General from suing private parties; it only prohibits the EEOC from suing governmental entities). . . .

> The responsible governmental unit having decided not to sue the Board, it would directly contradict that congressional decision if the EEOC were now free to proceed against the Board under the guise of Rule 19.

Eschewing the notion that the EEOC *must* be able to join governmental entities or enforcement of the statute will be frustrated, the court stated: "The Attorney General is, after all, part of the federal government also and if he decides to sue a public body he will necessarily have to make the converse decision to join the indispensable private party."

Rebuking the EEOC for its repeated and unsuccessful attempts to circumvent the statutory prohibition of 42 U.S.C. § 2000e-5(f)(1) by suing a governmental entity as a "necessary party" under Fed. R. Civ. P. 19, the court, in *U.S. Equal Employment Opportunity Comm'n v. American Federation of Teachers, Local # 571*, 761 F. Supp. 536 (N.D. Ill. 1991), awarded attorneys' fees to the sued school district, which was dismissed on motion to dismiss. The court found that the EEOC's suit against the district was "not only 'without foundation,' but was frivolous in view of the unambiguous statutory and case law authority which prohibited the EEOC from naming District 205 as a defendant to the suit." *Id.* at 539. While acknowledging that plaintiffs, generally, should not be penalized merely for advancing novel arguments because of the chilling effect that might have, nonetheless, "some litigation deserves to be chilled and this case presents a good example of such litigation." *Id.* at 540.

With respect to the EEOC's argument that it was not seeking relief from the district but was only naming it as a

"necessary party" under Rule 19, the court, in *American Federation of Teachers, Local # 571*, stated:

> [T]he EEOC argues that Congress intended to preclude the EEOC from suing governmental entities for some purposes but not for others. This position is entirely unsupported by the language of the statute, case law, and by any reasonable policy justification.

Id. at 539. Moreover,

> [w]hen the statute uses the term 'no further action' it really has to be read to mean exactly that. It does not permit naming the governmental agency . . . as a defendant and then saying in a sense . . . 'We are not threatening you because we are not seeking relief.' For a party to have to defend against litigation . . . is something that plainly the statute does not impose on the governmental body, except at the instance of the Attorney General and not the EEOC.

Id. at 541.

The EEOC's joinder tactic, allowed by the Ninth Circuit Court of Appeals, is contrary to the plain and unambiguous language of 42 U.S.C. § 2000e-5(f). Neither the Navajo Nation nor any other sovereign government, including the State of New Mexico, should be compelled to defend itself at the instance of one not authorized to sue it.

B. It is especially important in this case that the United States Attorney General be accorded his lawful and exclusive authority and discretion to decide whether to litigate against the Navajo Nation with respect to its employment preference law and its mining leases, which embody that preference. It is equally important that, in all cases involving governments, such as the individual States, the United States Attorney General be accorded this exclusive authority, as Congress has ordained.

For over forty years, Petitioner has mined coal on the Navajo reservation under leases and permits which require that Petitioner adhere to Navajo employment preference requirements. The leases have been amended at various times during this period of time, the most recent amendment occurring in 1999, and each time without any changes to the employment preference provisions.[17] The Secretary of Interior has approved these leases and the Navajo employment preference requirements.[18] This approval by the Secretary of Interior, in the context of this case, bespeaks a classic conflict among federal agencies requiring resolution or control by the United States Attorney General to assure that the federal government speaks with one, and only one, voice in deciding whether to bring a lawsuit against a governmental entity.

Congress intended that disputes between sovereigns be resolved through litigation only in accordance with the

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[17] *See* the district court's order. Pet. App. 29a.

[18] *See* the district court's order. Pet. App. 20a-21a; 29a-30a; 44a-47a.

judgment of a politically accountable official, the United States Attorney General, who is institutionally situated to take into account the views of the various federal agencies and to assess the impact and value that litigation may or may not have in the broader context of the relationship that the United States government has with the States of the Union and with its Indian Nations and Tribes. The Attorney General is better positioned and better suited to determine whether reasoned discourse between the United States government and the State or Tribal governments is a better approach to reaching a resolution on a particular issue rather than litigation.

The Attorney General is better suited to assess the relative merits of a litigious issue, both legally and from a broad policy perspective, than is the EEOC. Moreover, Congress has so determined, and that ends any policy debate on the matter from a judicial perspective. *See Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, 13-14 (2000) (observing, in the context of construction of a bankruptcy statute: "[W]e do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that a natural reading of the text produces the result we announce. Achieving a better policy outcome – if what petitioner urges is that – is a task for Congress, not the courts)." The EEOC promotes the idea that, by joinder, it may evade the requirement of referral to the Attorney General for suit, if any, against a governmental entity, but that idea amounts to "a fundamental revision of the statute . . . [and] was not the idea Congress enacted into law. . . ." *MCI Telecommunications Corp. v. American Telephone and Telegraph, Co.*, 412 U.S. 218, 232 (1994).

The Navajo employment preference provisions contained in Petitioner's leases that the EEOC believes are discriminatory go to the heart of Navajo governmental sovereignty, as does the Navajo Preference in Employment Act. Those lease provisions and the Act address critical employment needs of the Navajo People as well as the need to advance skill levels of the Navajo workforce.

The importance of these coal mining leases and the Navajo employment preference provisions to the Navajo Nation, from both an economic and governmental perspective, is explained in *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002) ("*Dawavendewa II*"). There, the plaintiff Hopi member sued, under Title VII, complaining of the Navajo employment preference provisions contained in the defendant district's leases with the Navajo Nation pursuant to which it operated a power plant. Because the Navajo Nation was an indispensable party which could not be joined based on sovereign immunity, the plaintiff's case was dismissed, and the Ninth Circuit appellate court upheld the dismissal. Explaining the reasons for concluding that the Navajo Nation was a necessary party to the action, the court stated:

> [T]he instant litigation threatens to impair the Nation's contractual interests, and thus, its fundamental economic interest with SRP [power plant]. The Nation strenuously emphasizes the importance of the hiring preference policy to its economic well-being. In fact, the Nation asserts that '[without the hiring preference provision], the Navajo Nation would never have approved this lease agreement.'

Id. at 1157.

Continuing, the appellate court stated:

> Because Dawavendewa challenges the Nation's ability to secure employment opportunities and income for the reservation – its fundamental consideration for the lease with SRP – the Nation . . . claims a cognizable economic interest . . . which may be grievously impaired. . . . In addition, a judgment rendered in the Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation.

Id. Quoting the Navajo Nation's *amicus* brief, the court stated:

> [The lease] has cost Navajo water, Navajo coal, Navajo prime land, and the inevitable pollution of the Navajo homeland. It is a bargained for price that the Navajo Nation alone paid in return for jobs for the Navajo people. . . . Undermining the Nation's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively and efficiently.

Id.

In a prior decision involving these parties, *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1124 (9th Cir.), *cert. denied*, 528 U.S. 1098 (2000) ("*Dawavendewa I*"), the Ninth Circuit Court of Appeals reversed the lower court's dismissal of plaintiff's complaint, believing that the Indian preference exemption, 42 U.S.C. § 2000e-2(i) does not include preferences based on tribal affiliation. In *Dawavendewa II*, the court explains its earlier ruling:

> In *Dawavendewa I*, we held only that a hiring preference policy based on tribal affiliation . . .

> stated a claim upon which relief could be granted. . . . As pointed out by the Solicitor General's amicus brief, however, we did not address the merits of the Nation's proffered legal justifications in defense of the challenged hiring preference policy. In particular, we declined to consider whether the Nation's 1868 Navajo Treaty, the federal policy fostering tribal self-governance, the NPEA, or any other legal defense justified SRP's hiring preference policy.

Dawavendewa II, 276 F.3d at 1158. *Dawavendewa II*, however, in upholding the final dismissal of plaintiff's case for failure to join, and inability to join, the Nation, an indispensable party, may have, at least arguably, opened the door to the present litigation by observing that "nothing precludes Dawavendewa from refiling his suit in conjunction with the EEOC." *Id.* at 1163.

Dawavendewa II erroneously extended this arguable invitation to the EEOC. In no circumstance under 42 U.S.C. § 2000e-5(f)(1) can the EEOC square off as plaintiff in a lawsuit against a government. Only the United States Attorney General may sue a government. The court's very description of matters it has yet to consider in determining the validity of the Navajo employment preference amply demonstrates why Congress has chosen to confide to the United States Attorney General's sole discretion and authority the judgment whether to litigate against a government, the Navajo Nation here.

This Court should firmly shut the door to any attempt to circumvent 42 U.S.C. § 2000e-5(f)(1) by the device of joinder of a government under Rule 19. This Court, therefore, should reverse the Ninth Circuit Court of Appeals below.

CONCLUSION

Amicus Curiae State of New Mexico and the other *Amici Curiae* joining States respectfully submit that the case at bar is extremely important to the preservation of Congress' power to enact and enforce its laws and its policies as established by Congress. *Amicus Curiae* State of New Mexico and the other *Amici Curiae* joining States respectfully pray that the Petition for Writ of Certiorari be granted; that the lower court be reversed; that the lawful and exclusive authority of the United States Attorney General be acknowledged and restored; and that the Court grant such further relief as the Court deems just and proper.

Dated: December 16, 2005

Respectfully submitted,

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